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In The

Supreme Court of the United States

October Term, 1980

HAVENS REALTY CORPORATION and
ROSE JONES,

Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Article III of the United States Constitution confers standing under the Fair Housing Act on a "tester" or on any other surrogate for persons directly injured by alleged discrimination, absent any allegation of injury to the tester or surrogate, which is the question this Court expressly left unanswered in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979).

2. Whether Article III of the United States Constitution confers standing under the Fair Housing Act on a person who alleges that a defendant has deprived him of the benefits of interracial association but who fails to allege any facts supporting a logical nexus between the defendant's acts and that deprivation.

3. Whether Article III of the United States Constitution confers standing under the Fair Housing Act on an organizational plaintiff based solely on its general interest in equal housing opportunity and its efforts to achieve equal housing opportunity.

4. Whether a series of discrete acts constitutes a continuing violation which tolls the 180 day statute of limitation under the Fair Housing Act.

PARTIES IN THE COURT OF APPEALS

Paul Allen Coles, a plaintiff in the District Court, was listed in the caption of the Court of Appeals as plaintiff, but not as appellant. There were no issues with respect to him in the Court of Appeals and he has no interest in the outcome of this petition. All other parties are named in the caption of the case in this Court.

CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

THE STATUTES INVOLVED 2

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE WRIT 11

The Decision of the Court of Appeals That Tester Status Alone Confers Standing Under the Fair Housing Act Involves an Important Question of Federal Constitutional Law Expressly Left Unanswered in *Gladstone, Realtors* v. *Village of Bellwood* 11

The Decision of the Court of Appeals With Respect to Standing of Persons Who Allege That They Have Been Deprived of the Benefits of Interracial Association Raises Important Questions Concerning This Court's Decisions in *Trafficante* v. *Metropolitan Life Insurance Co.* and *Gladstone, Realtors* v. *Village of Bellwood* 14

The Decisions of the Fourth and Seventh Circuits Conflict Concerning an Organizational Plaintiff's Standing Under the Fair Housing Act 17

The Decisions of the Third and Fourth Circuits Conflict Concerning Whether the Limitation Period Under Section 812 of the Fair Housing Act Applies When a Plaintiff Alleges Several Discrete Acts of Discrimination 20

Page

CONCLUSION 22

CERTIFICATE OF SERVICE 23

APPENDIX—TABLE OF CONTENTS ..... A

TABLE OF AUTHORITIES

Cases

Page

Evers v. *Dwyer*, 358 U.S. 202 (1958) 12

Fair Housing Council of Bergen County, Inc. v. *Eastern Bergen County Multiple Listing Service, Inc.*, 422 F.Supp. 107 (D.N.J. 1976) 16, 18

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) .....i, 11, 13, 14, 15

Heights Community Congress v. *Rosenblatt Realty, Inc.*, 73 F.R.D. 1 (N.D. Ohio 1975) 18

Hunt v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977) 9, 19

Meyers v. *Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977) 21

Pierson v. *Ray*, 386 U.S. 547 (1967) 12

Sherman Park Community Association v. *Wauwatosa Realty Co.*, 486 F.Supp. 838 (E.D. Wis. 1980) 13, 16

Sierra Club v. *Morton*, 405 U.S. 727 (1972) 9, 10, 18

Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) 13

Stingley v. *City of Lincoln Park*, 429 F.Supp. 1379 (E.D. Mich. 1977) 21, 22

Page

Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) 14

United States v. *Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) 16

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 9

Village of Bellwood v. *Dwayne Realty*, 482 F.Supp. 1321 (N.D. Ill. 1979) 13, 19

Village of Bellwood v. *Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979) 13, 17, 18

Warth v. *Seldin*, 422 U.S. 490 (1975) 9, 10, 13, 14, 16

Constitutional Provisions

U.S. Const. art. III .....passim

Statutes

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 5

28 U.S.C. § 1337 5

28 U.S.C. § 1343(4) 5

28 U.S.C. § 2201 5

The Civil Rights Act of 1866 (42 U.S.C. § 1982) 5

Title VII of the Civil Rights Act of 1968 (42 U.S.C. §§ 2000e *et seq.*) 20

Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*) 5, 11

42 U.S.C. § 3604 3

42 U.S.C. § 3612 .....3, 5, 20

42 U.S.C. § 3613 20

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia was not reported. The opinion of the Fourth Circuit Court of Appeals has not yet been reported. Both opinions are contained in the Appendix to this petition.

JURISDICTION

The Fourth Circuit Court of Appeals entered judgment on September 18, 1980. This petition for certiorari was filed within 90 days of that date.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

THE STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED[1]

United States Constitution, Article III, Section 2, Clause 1:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States, —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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[1] Complete texts of additional authorities cited in this petition are set forth in the Appendix.

42 U.S.C. § 3604:

§ 3604. Discrimination in the sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

42 U.S.C. § 3612:

§ 3612. Enforcement by private persons

(a) Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending

conciliation efforts; prior bona fide transactions unaffected by court orders

The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary of a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(b) Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security

Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) Injunctive relief and damages; limitation; court costs; attorney fees

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

STATEMENT OF THE CASE

This case arose from the alleged practices of Havens Realty Corporation (Havens) and one of its employees, Rose Jones (Jones), in Henrico County, Virginia, a suburb of Richmond, Virginia. Havens is a Virginia corporation with its principal place of business at two apartment complexes, Camelot Townhouse Apartments (Camelot) and Colonial Court Apartments (Colonial Court), which are located directly across the street from each other. They are owned and managed by Havens.

On January 9, 1979, Paul Allen Coles (Coles), Sylvia Coleman (Coleman), R. Kent Willis (Willis), and Housing Opportunities Made Equal (HOME) filed an action in the United States District Court for the Eastern District of Virginia, Richmond Division, alleging that the defendants had engaged in the practice of racial steering of prospective apartment renters, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1982, and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (the Fair Housing Act). The district court's jurisdiction was based on 42 U.S.C. § 3612(a) and 28 U.S.C. §§ 1331, 1337, 1343(4) and 2201. The complaint sought declaratory and injunctive relief, compensatory and punitive damages, and costs and

attorneys' fees. The individual plaintiffs purported to represent a class composed of all persons who have rented or sought to rent property in Henrico County, Virginia, and who have been or continue to be, adversely affected by the acts, policies, and practices of Havens and Jones.

The complaint, which is included in the Appendix (App. 27), characterizes Coles, a black man, as a "renter plaintiff." The expression "renter plaintiff" means that Coles sought housing information from Havens and was ready, willing, and able to sign an apartment lease with Havens. This concept of "renter plaintiff" contrasts with the characterization of the other two individual plaintiffs, Coleman and Willis, as "tester plaintiffs." Coleman, a black woman, and Willis, a white man, were not actually seeking housing information for their own purposes, nor were they ready, willing and able to execute a lease. Instead, as the complaint alleges, they "consulted [Havens and Jones] with regard to available rentals in the course of their employment with Housing Opportunities Made Equal to determine whether or not [Havens and Jones] have practiced racial steering in the rental housing market" (App. 29).

The organizational plaintiff, HOME, is a Virginia nonprofit corporation, with its principal place of business in Richmond, Virginia. HOME's purpose, the complaint states, is "to make equal opportunity in housing a reality in the Richmond Metropolitan Area" (App. 29). The complaint alleges that HOME has a multi-racial membership of approximately 600 people, but it fails to allege where any of its members reside or any additional facts concerning HOME's membership. HOME's goal are alleged to include the elimination of unlawful racially discriminatory housing practices that cause injury to its members, to all persons who seek apartment units in the Richmond Metropolitan Area

and to all persons who reside in the Richmond Metropolitan Area (App. 29). It is alleged that HOME seeks to assure all such persons the right to the important social, professional, business, economic and political benefits of interracial associations that arise from living in integrated communities (App. 29-30). Finally, the complaint states that HOME's activities include: (1) seeking to assist and aid individuals of all races in obtaining housing in the Richmond Metropolitan Area through the operation of a housing counseling service, (2) investigation of allegations of discrimination and the referral of complaints to appropriate state and federal agencies, and (3) independent investigations of real estate brokers located in the Richmond Metropolitan Area (App. 30).

The complaint makes both general and specific allegations against the defendants. The complaint alleges generally that the defendants treat differently white and nonwhite prospective lessees on the basis of race by consistently showing white customers rental units in buildings occupied primarily by white tenants, by failing to show such units to black customers, and by showing black customers units in buildings occupied primarily by black tenants. More specifically, the complaint identifies five distinct instances of alleged steering by the defendants. The only instance involving the renter plaintiff, Coles, occurred on July 13, 1978, or 180 days prior to the filing of the complaint. All other instances involved either non-party testers or the tester plaintiffs, Coleman and Willis, and all of these occurred more than 180 days prior to the filing of the complaint.

On January 31, 1979, the defendants filed a motion to dismiss stating, among other things, that (1) all claims asserted under the Fair Housing Act were time barred and

should be dismissed, except the claim arising on July 13, 1978, and that (2) HOME, Coleman, and Willis lacked standing to assert claims under the Fair Housing Act of 1968 and the Civil Rights Act of 1866. On February 16, 1979, the district court sustained the defendants' motion to dismiss on both grounds (App. 21). A timely notice of appeal was filed by HOME, Coleman and Willis.

On September 18, 1980, the Fourt Circuit reversed the decision of the district court. The Court of Appeals held that Coleman's and Willis' mere status as testers was sufficient to confer standing under the Fair Housing Act. The Court of Appeals further held, in the alternative, that Coleman and Willis had standing in their individual capacity (as opposed to their capacity as testers) because they had alleged specific injury by averring that the defendants' conduct had deprived them of the right to "important social, professional, business and economic, political and aesthetic benefits of interracial association that arise from living in integrated communities free from discriminatory housing practices. . . ." (App. 33). The Fourth Circuit found that this allegation alone was sufficient to confer standing, even though the court acknowledged, "[t]he complaint in the instant case does not specifically allege that the discrimination practiced [by Havens] affect [sic] the area where the testers reside" (App. 17). In so holding, the Court of Appeals expressly declined to formulate any general rule circumscribing standing for tester plaintiffs (App. 10).

In practical effect, the Fourth Circuit's holding concerning the standing of Coleman and Willis gives standing to them both in their status as individual residents of the entire Richmond Metropolitan Area (an area undefined in the complaint) and in their status as testers, regardless of

whether or not they are residents of the Richmond Metropolitan Area.

With regard to the standing of HOME, the Court of Appeals held that, insofar as its members had been deprived of the same "community advantages" denied to Coleman and Willis by the actions of the defendants, HOME has representational standing to litigate these claims on behalf of its members, relying upon the requirements for representational standing set forth in *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977) and *Warth* v. *Seldin*, 422 U.S. 490 (1975) (App. 14). The question of representational standing was neither briefed nor argued by HOME in the Fourth Circuit.

The Fourth Circuit also held that the complaint alleged sufficient injury to HOME as an entity to confer standing on it in its own right, in addition to its standing as the representative of its members. Here, the Fourth Circuit held that HOME had standing because it had been frustrated in its efforts to assist equal access to housing through its counseling and referral services, and because it had devoted significant resources to identifying and counteracting the defendants' discriminatory steering practices (App. 15). The Court of Appeals held that HOME's interest was more than the protestations of general interest found to be insufficient for standing in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972) and *Warth* v. *Seldin, supra*, although less than the injury suffered by the non-profit developer in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In so doing, the Fourth Circuit stated that HOME's goals were "functional," and that its "projects" provided " 'the essential dimension of specificity' that informs judicial decision making," as described in *Arlington Heights* (App. 15-16). However, the Fourth

Circuit failed to offer any reasons to justify its conclusion that HOME had more than the generalized interest that was insufficient to confer standing in *Sierra Club* v. *Morton* and *Warth* v. *Seldin*.

With regard to the statute of limitations, the Fourth Circuit held that the plaintiffs could base their Fair Housing Act claims upon acts occurring outside the applicable 180 day limitation period because the complaint alleged that the actions of the defendants constituted a continuing violation. Thus, the Court of Appeals held that the 180 day limitation period commenced to run with the last act alleged in the complaint and if that act occurred within the limitation period, which it did, none of the other alleged acts are time barred. The Court of Appeals based this conclusion on the general proposition that the primary focus of the statute is not on isolated instances of discrimination, but rather on the generalized practice of housing discrimination.

REASONS FOR GRANTING THE WRIT

The Decision Of The Court Of Appeals That Tester Status Alone Confers Standing Under The Fair Housing Act Involves An Important Question Of Federal Constitutional Law Expressly Left Unanswered in *Gladstone, Realtors* v. *Village of Bellwood.*

The Fourth Circuit held that the individual plaintiffs, Coleman and Willis, have standing to bring an action under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*, solely in in their capacity as "testers," which the Fourth Circuit defined as persons who "contacted defendants concerning the availability of rental apartments in the course of their employment with HOME to determine whether defendants were practicing racial steering" (App. 4). In *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), although the plaintiffs were testers, they did not assert standing as testers in this Court. Therefore, this Court did not reach that question. *Id.* at 111. The Court of Appeals based its holding on the important public policy goals which the Fair Housing Act was designed to achieve (App. 8). While admitting that the testers serve as nothing more than "surrogates" for persons "illegally denied housing" by violations of the Fair Housing Act (App. 10), the Court of Appeals held that the testers had standing in the absence of any allegations concerning the nature, or even the existence of their injury. Thus, what the Fourth Circuit has held is that anyone who tests the compliance of another person with the Fair Housing Act has standing to commence an action and seek redress for the alleged violation, without regard to the nature, cause, or even existence, of their injury, and without pleading any facts supporting the nexus between tester status, the acts of the defendant, and the injury. In effect, as a result of the Fourth Circuit's decision, a pleading that alleges that a plaintiff tested a defendant and that the de-

fendant failed the test is sufficient for a trial on the merits, notwithstanding that the pleading failed to allege any facts relating the unlawful acts to the injury. All that a tester must plead is the conclusion that the unlawful act occurred. For example, had Coleman and Willis resided in Chicago, Illinois, and tested the defendants in this case, they would have had standing, according to the Fourth Circuit, and would have been able to compel a trial on the merits. Stripped of all rhetorical flourishes, a tester, according to the Fourth Circuit, does not have to plead or prove any facts concerning injury.

The Fourth Circuit seeks to justify its holding that tester status alone confers Article III standing by citing *Pierson* v. *Ray*, 386 U.S. 547 (1967) and *Evers* v. *Dwyer*, 358 U.S. 202 (1958). In *Pierson*, black persons occupied the "whites only" section of a bus station to "test" the validity of a municipal ordinance requiring racial segregation. The black plaintiffs in *Evers* "tested" a similar ordinance by occupying the white section of a bus. This Court held in both cases that simply because the plaintiffs violated the ordinances in order to test their constitutionality does not deprive the plaintiffs of standing. The so-called "testers" in *Evers* and *Pierson* each suffered specific injury by being unlawfully deprived because of their race of the right to occupy certain public accommodations or conveyances. This Court ruled that Article III is satisfied when specific injury such as this is present, whether or not plaintiffs incurred the injury solely for the purpose of instituting litigation. The Fourth Circuit, however, inverted the analysis in *Pierson* and *Evers*, and held that, so long as a plaintiff takes action for the purpose of determining whether a law is being violated, standing is conferred, whether or not the plaintiff suffered any distinct and palpable injury at the hands of the defendant.

The approach of the Court of Appeals to this question is unsupported by prior authority. The standing limitations imposed by Article III of the United States Constitution require that a plaintiff assert a distinct and palable injury to himself, *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), that is likely to be redressed by the requested relief. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). In this case, plaintiffs did not allege any injury to themselves as testers, and the Fourth Circuit did not find any injury. These plaintiffs did not seek to exercise any rights of their own, as did the plaintiffs in *Pierson* and *Evers*, and do not allege injury to themselves as a result of the denial of the rights of others. Clearly, under familiar Article III principles, these plaintiffs do not have standing in their capacity as testers.

Although the standing of testers has been placed in issue in several cases, the question has been analyzed in those cases on the basis of the injury they alleged as persons deprived of the benefits of interracial association. *See, e.g., Village of Bellwood* v. *Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979); *Sherman Park Community Association* v. *Wauwatosa Realty Co.*, 486 F.Supp. 838 (E.D.Wis. 1980); *Village of Bellwood* v. *Dwayne Realty*, 482 F.Supp. 1321 (N.D.Ill. 1979). Prior to the decision of the Court of Appeals in the instant case, a court has never suggested that a tester has standing to vindicate the rights of others without regard to any personal injury having been sustained by the tester.

The Fourth Circuit's decision is wholly inconsistent with the case or controversy limitation of Article III and means that *any* person who chooses to do so may bring an action under the Fair Housing Act to vindicate the rights of others, whether or not that person has any connection whatsoever

to the person allegedly discriminated against, or the community or neighborhood affected by the alleged discriminatory housing practice. The extraordinary significance of the Court of Appeals' deviation from established law in the area of constitutional standing limitations mandates correction by this Court.

The Decision Of The Court Of Appeals With Respect To Standing Of Persons Who Allege That They Have Been Deprived Of The Benefits Of Interracial Association Raises Important Questions Concerning This Court's Decisions In *Trafficante* v. *Metropolitan Life Insurance Co.* and *Gladstone, Realtors* v. *Village Of Bellwood.*

The Court of Appeals found that the individual plaintiffs who allege that they have been deprived of the benefits of interracial association have standing under the Fair Housing Act. In this decision, the Court of Appeals went far beyond this Court's prior decisions concerning standing under the Fair Housing Act in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), and *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). The decision of the Court of Appeals effectively grants standing to anyone residing in a major metropolitan area who includes in his complaint the conclusory allegation that he is "deprived of the benefits of interracial association," whether or not there is a logical nexus between the defendants' acts and the deprivation. Thus, the decision of the Court of Appeals effectively eliminates as well the constitutional requirement that a plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention." *Warth* v. *Seldin*, 422 U.S. 490, 508 (1975) (emphasis in original).

The individual plaintiffs in this case allege only that they

are residents of the City of Richmond or the County of Henrico,[2] two contiguous political subdivisions with a population of nearly 400,000 people (App. 16). They also claim that defendants' alleged practice in two adjacent apartment complexes in Henrico County "contributes to maintaining existing neighborhood segregation and inhibits the development of stable racially integrated neighborhoods," apparently in the entire Richmond Metropolitan Area (App. 30-31), which presumably includes at least the City of Richmond, the County of Henrico and the County of Chesterfield, an area with a population of well over one-half million people.[3]

By contrast, in *Bellwood*, four residents of an integrated neighborhood allegedly "targeted" by defendant for racial steering were found to have standing because the defendant's conduct allegedly jeopardized their right to live in an integrated community. However, summary judgment was affirmed against two non-residents of the target neighborhood who alleged no facts to show how steering directed towards the target neighborhood affected the areas where they resided. *Bellwood*, 441 U.S. at 111 n. 25.

Also by contrast, in *Trafficante*, the plaintiffs were residents of the apartment complex that was the target of defendants' alleged discrimination. They had standing to challenge their landlord's discriminatory rental policies because those policies denied the plaintiffs the right to live in an integrated community. *Trafficante*, 409 U.S. at 206. In *Trafficante* it was reasonable to conclude from those facts

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[2] Although the Court of Appeals apparently believed that Coleman and Willis are residents of Henrico County (App. 11), the complaint merely alleges that the "individual plaintiffs. . . are all residents of the City of Richmond or Henrico County" (App. 29).

[3] The Richmond Standard Metropolitan Statistical Area is composed of eight political subdivisions with a combined area of over 2,000 square miles. Department of Commerce, Bureau of the Census, County and City Data Book (1977).

that actual injury occurred to the plaintiffs and would be redressed by cessation of the alleged discrimination because the plaintiffs resided in the apartment complex where the acts of discrimination occurred. *Trafficante* clearly did not hold, as the Fourth Circuit has here, that racial discrimination practiced by a landlord of an apartment complex could be challenged by all persons residing in an entire metropolitan area.

It is " 'an ingenious academic exercise in the conceivable' ", *Warth* v. *Seldin*, 422 U.S. at 509, quoting *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 688 (1973), to conclude that everyone in the Richmond Metropolitan Area is harmed by alleged discriminatory practices at two adjacent apartment complexes in Henrico County or that the cessation of those practices will affect the racial composition of neighborhoods throughout the entire Richmond Metropolitan Area, and therefore affect every person residing in that metropolitan area. This conclusion of the Court of Appeals is clearly in conflict with this Court's decisions under Article III, which require the allegation of concrete and specific facts upon which standing is based.

This Court should grant certiorari to provide guidance to the lower courts on the scope of this Court's decisions in *Bellwood* and *Trafficante*. Guidance is particularly necessary at this time because of the growing number of cases addressing the standing of persons asserting the rights of others under the Fair Housing Act,[4] as well as other statutes in which prudential standing limitations have been eliminated by Congress.

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[4] *See, e.g., Sherman Park Community Association* v. *Wauwatosa Realty Co.*, 486 F.Supp. 838 (E.D. Wis. 1980); *Fair Housing Council of Bergen County, Inc.* v. *Eastern Bergen County Multiple Listing Service, Inc.*, 422 F.Supp. 1071 (D.N.J. 1976).

The Decisions Of The Fourth And Seventh Circuits Conflict Concerning An Organizational Plaintiff's Standing Under The Fair Housing Act.

The Court of Appeals also found that HOME, an organization concerned with the elimination of racially discriminatory housing practices in the Richmond Metropolitan Area, has standing under the Fair Housing Act, both as a representative of its members and on the basis of its own alleged injury. HOME alleges injury to itself and its members in the following language:

> Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices. HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices in violation of the Fair Housing Act of 1968, 42 U.S.C. §3601, *et seq.*

(App. 33-34)

The Fourth Circuit's decision that HOME has standing based on these allegations is in direct conflict with the Court of Appeals for the Seventh Circuit in *Village of Bellwood* v. *Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979).

One of the plaintiffs in *Bellwood* was the Leadership Council for Metropolitan Open Communities. Like HOME, the Leadership Council is a non-profit corporation devoted to eliminating housing discrimination in a major metropolitan area and, like HOME, it alleged that racial steering

hampers and interferes with its work and purpose and costs it money to investigate and to attempt to eliminate such practices. *Id.* at 1015. The Seventh Circuit had no difficulty in holding that the Leadership Council lacked standing:

> [T]he Council's interest in open housing matters and its asserted commitment to effectuating that interest, albeit commendable, do not substitute for the concrete injury constitutionally required to invoke the jurisdiction of the federal courts. The alleged dollar cost to the Council of attacking defendants' alleged practices is simply "concomitant to [its] keen concern" about open housing issues, and does not present independently cognizable injury.

Id. at 1017 (citations omitted). The Seventh Circuit denied standing under the Fair Housing Act on the ground that an organizational plaintiff, like an individual plaintiff, must assert more than a mere interest in a social problem and an effort to further that interest. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). Thus, on nearly identical allegations of injury, the Seventh Circuit denied standing to the Leadership Council while the Fourth Circuit granted standing to HOME.

Lower courts are also in conflict on this issue. In *Heights Community Congress* v. *Rosenblatt Realty, Inc.*, 73 F.R.D. 1 (N.D.Ohio 1975), the district court found that a similar organization had standing based on allegations that the organization's purpose is "the promotion and maintenance of Cleveland Heights as an open and integrated community," *id.* at 2, and that " 'the conduct of the defendant directly obstructs, frustrates and damages the congress in achieving its objective by impeding the processes which are used to benefit the entire community of Cleveland Heights.' " *Id.* at 4. By contrast, in *Fair Housing Council of Bergen County, Inc.* v. *Eastern Bergen County Multiple Listing Service,*

Inc., 422 F.Supp. 1071 (D.N.J. 1976), the district court held:

> Insofar as the Fair Housing Council seeks standing based on its special interest in eradicating discriminatory housing practices in Bergen County and its expenditure of monies towards that end, its complaint must fail.

Id. at 1083. *Accord, Village of Bellwood* v. *Dwayne Realty*, 482 F.Supp. 1321 (N.D.Ill. 1979).

As these and other cases indicate, the standing of local fair housing organizations is an important federal question on which federal courts conflict. Since this issue will continue to arise with increasing frequency, a writ of certiorari should issue to resolve this conflict and provide guidance to the lower federal courts.

The Court of Appeals also found that HOME has standing as a representative of its members, although the point was neither briefed nor argued by HOME. The Court of Appeals recognized that in order for an organization to have standing, its members must have standing in their own right, *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977); however, there is absolutely nothing in the complaint which indicates that any HOME member has standing. There is no connection whatsoever between the defendants' alleged practices and any HOME member. The complaint does not even allege that the members are residents of the Richmond Metropolitan Area, much less Camelot or Colonial Court apartments or the neighborhood surrounding them. Thus, the principles discussed earlier in this petition concerning standing of individuals who allege that they have been deprived of the benefits of interracial association apply with even greater force to the Court of Appeals' decision that HOME has standing

as a representative of its members. A writ of certiorari should issue to review this unwarranted disregard of the requirements of Article III.

The Decisions Of The Third And Fourth Circuits Conflict Concerning Whether The Limitation Period Under Section 812 Of The Fair Housing Act Applies When A Plaintiff Alleges Discrete Acts Of Discrimination.

The district court in this case held that the plaintiffs' action under the Fair Housing Act was barred by the limitation period of Section 812, 42 U.S.C. § 3612(a), insofar as that action was based on acts of discrimination occurring more than 180 days before the complaint was filed. The Court of Appeals reversed, holding that the alleged acts of the defendants amounted to a continuing violation and that, therefore, the plaintiffs' action could be based on events occurring outside of the 180 day limitation period.

Although a continuing violation of Title VII of the Civil Rights Act of 1968, 42 U.S.C. §§ 2000e *et seq.*, has been recognized as tolling the 180 day limitation period of that title, that rationale has never been recognized by this Court in Title VIII cases. In the context of Title VIII, the continuing violation theory is an unnecessary adjunct to the statutory scheme of remedies. If a pattern or practice of discrimination in violation of the Fair Housing Act is occurring, the Attorney General is empowered to bring an action for equitable relief under Section 813, 42 U.S.C. § 3613. The plaintiffs improperly attempt to assume the role of the Attorney General in this action under Section 812, a section designed for the vindication of private rights with respect to discrete violations.

Furthermore, the acts of discrimination allegedly committed by defendants are unitary acts, occurring at distinct and identifiable points in time. Since each act involved

deliberate testing by the individual plaintiffs or other employees of HOME (App. 31-33), these acts were known to the plaintiffs at the time they were committed and any cause of action arose then. Having failed to act on any claims which arose from these acts within the limitation period, the plaintiffs are barred with respect to these acts. Even if a continuing violation theory were appropriate under Title VIII, the plaintiffs clearly have alleged several discrete acts, not a continuing violation.

The question of what constitutes a continuing violation under the Fair Housing Act has arisen in several cases. In *Meyers* v. *Pennypack Woods Home Ownership Association,* 559 F.2d 894 (3d Cir. 1977), the Third Circuit did not find a continuing violation in the repeated refusal of the defendants to sell a home to the plaintiff. *Id.* at 899. Additionally, that court appeared to question whether or not the continuing violation rationale was appropriate under Title VIII. *Id.* The decision of the Fourth Circuit in the instant case is in conflict with the decision Third Circuit. Similarly, in *Stingley v. City of Lincoln Park,* 429 F.Supp. 1379 (E.D. Mich. 1977), the court held that there could not be a continuing violation where "an exact date can be determined on which the alleged discriminatory practice occurred," *id.* at 1391, stating:

> If there was validity to the argument that because the defendant still maintained its residency policy that there was a continuing discriminatory act, then the time limits of Title VII [sic] would become entirely meaningless. For example, in every case of employment discharge brought under Title VII, plaintiffs invariably plead a pattern and practice of discriminatory conduct. Since this pattern and practice arguably continues, the end result would be that a discharged employee would have forever to bring his complaint. Such was clearly

> not the intention of Congress in enacting the time limits that are contained in both Title VII and Title VIII. Similarly, as applied to the facts in this case, the argument advanced by the plaintiff would mean that there would be no limit in which they would have had to institute action.

Id. at 1391. Again, the Fourth Circuit is in conflict with the district court in *Stingley* in finding a continuing violation in discrete, identifiable acts of alleged discrimination.

In view of the conflict between the Third and Fourth Circuits, a writ of certiorari should issue to resolve this important question of federal statutory construction.

CONCLUSION

This case presents important questions of federal constitutional law involving standing under the Fair Housing Act, and federal statutory law involving the statute of limitations under Section 812, on which courts of appeals and district courts conflict. Review of the opinion and judgment of the Court of Appeals is timely, appropriate and necessary. This petition should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that six (6) copies of the foregoing Petition for Writ of Certiorari with Appendix have been served by mail on counsel for respondents, addressed as follows: three (3) copies to Daniel M. Singer, Theodore C. Hirt, Vanessa Ruiz and Dennis J. Riley, Fried, Frank, Harris, Shriver & Kampelman, 600 New Hampshire Avenue, N.W., Suite 1000, Washington, D. C. 20037, and three (3) copies to James F. Stutts, McSweeney, Stutts & Burtch, 121 Shockoe Slip, Richmond, Virginia 23219.

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

Page

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS ..... App. 2

ORDER OF DISMISSAL IN THE DISTRICT COURT A-21

MEMORANDUM OF DISMISSAL IN THE DISTRICT COURT A-22

ORDER DENYING MOTION TO RECONSIDER IN THE DISTRICT COURT A-25

ORDER FOR FINAL JUDGMENT IN THE DISTRICT COURT A-26

COMPLAINT IN THE DISTRICT COURT A-27

AUTHORITIES CITED A-38

42 U.S.C. § 1982 ..... A-38

42 U.S.C. § 3613 ..... A-38

App. 2

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1199

PAUL ALLEN COLES,

Plaintiff,

AND

SYLVIA COLEMAN, R. KENT WILLIS,
and on behalf of all other similarly situated,
and Housing Opportunities Made Equal,
a Virginia Corporation,

Appellants,

v.

HAVENS REALTY CORPORATION,
a Virginia Corporation, and Rose Jones,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Virginia. D. Dortch Warriner, District Judge.

Argued: January 10, 1980 Decided: September 18, 1980

Before FIELD, Senior Circuit Judge, HALL and SPROUSE, Circuit Judges.

Vanessa Ruiz (Daniel M. Singer, Theodore C. Hirt, Dennis J. Riley, Fried, Frank, Harris, Shriver & Kampelman; James F. Stutts, McSweeney and Stutts on brief) for Appellants; Richard W. Hogan (Linda L. Royster, Hirschler, Fleischer, Weinberg, Cox & Allen on brief) for Appellees.

SPROUSE, Circuit Judge:

This is an appeal from a final judgment of the district court granting defendants' motion to dismiss an action involving allegations of "racial steering" and racial discrimination in the rental of housing accommodations in the City of Richmond and Henrico County, Virginia. "Racial steering" is a practice by which real estate brokers and agents preserve and encourage patterns of racial segregation by steering members of racial and ethnic groups to buildings occupied primarily by members of their own racial or ethnic group and away from buildings and neighborhoods inhabited by members of other races or groups.

This suit was brought under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601, 3604, 3612(a) (hereafter Fair Housing Act) and the Civil Rights Act of 1866, 42 U.S.C. § 1982. The district court dismissed all the claims except that of a single plaintiff, Paul Allen Coles. It held that the other claims were time-barred by the 180-day limitation period of the Fair Housing Act, and that the other plaintiffs lacked standing to assert discrimination claims under either statute. After a careful review of the law, we conclude that all plaintiffs have standing under the Fair Housing Act and that their claims are not time-barred. We therefore reverse and remand for further proceedings. We do not reach the questions of standing under 42 U.S.C. § 1982.

The corporate plaintiff in this action is Housing Oppor-

tunities Made Equal (HOME). HOME is a Virginia nonprofit corporation with about 600 members created for the purpose of eliminating unlawful, discriminatory housing practices, thereby seeking to make equal opportunity in housing a reality in the Richmond Metropolitan Area. HOME activities include: assisting individuals of all races in obtaining housing in the metropolitan area through the operation of a housing counseling service; investigating allegations of discrimination and referring complaints to appropriate federal and state authorities; conducting independent investigations of real estate brokers located in the metropolitan area to determine whether housing is being made available without regard to race; and taking appropriate steps to eliminate any racial discriminatory housing practices it may have found to exist.

The three individual plaintiffs, a "renter" and two "testers", reside in the City of Richmond or Henrico County. Paul Allen Coles, a black person, unsuccessfully sought to rent housing accommodations from the defendants. The two "tester" plaintiffs, Sylvia Coleman, a black person, and R. Kent Willis, a white person, contacted defendants in regard to the availability of rental apartments in the course of their employment with HOME to determine whether defendants were practicing racial steering. Corporate defendant is Havens Realty Corporation (Havens), which is in the business of providing real estate brokerage services for rental apartment units in Richmond. The remaining defendant is Rose Jones, a Havens employee.

The factual allegations in the complaint must be accepted as true in the present posture of the case.[1] So construed, the complaint reflects the following facts relevant to the disposition of this appeal.

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[1] *Warth* v. *Seldin*, 422 U.S. 490 (1975).

An unnamed black tester on March 14, 1978, inquired about rental vacancies at Havens and was told by Rose Jones that nothing was available. Later that day Willis, the white tester, asked about vacancies and was told by Jones that apartments were available at Colonial Court and Camelot Townhouse apartments. Colonial Court is integrated and Camelot Townhouse is predominately occupied by whites. A week later on March 21, 1978, black tester Sylvia Coleman asked generally about vacancies in apartments in Henrico County and was informed by one of defendant's employees that nothing was available, although the same day white tester R. Kent Willis was informed by Jones that there was an apartment at Colonial Court. Two days later, on March 23, 1978, black tester Coleman again asked Jones about vacancies and was told that nothing was available. White tester Willis was informed that day by Jones that an apartment was available at Colonial Court. On July 6, 1978, black tester Coleman asked specifically about Camelot Townhouse apartments and again received a negative response, but she was told about a vacancy at Colonial Apartments. That same day white tester John Barr, upon inquiry, was told an apartment was available at Camelot Townhouse apartments.

Coles visited defendant's offices on July 13, 1978, inquiring into the availability of apartments at Camelot Townhouses. He was informed there were no vacancies at Camelot but that an apartment was available in the adjoining integrated Colonial Court Apartment complex. The same day John Barr, a white tester, was informed by Rose Jones telephonically that an apartment was available at Camelot Townhouse—upon visiting the defendant's offices Barr was again informed that an apartment was available in the Camelot Townhouse.

The plaintiffs filed this action on January 9, 1979, individually and as a class action. The class included all persons who have rented or sought to rent residential property in Henrico County, Virginia, and who are adversely affected by the defendant's discriminatory acts, policies and practices. They seek declaratory and injunctive relief for the class, as well as an order requiring Havens to take various affirmative actions to overcome the effect of its past discriminatory actions. The individual plaintiffs in addition seek compensatory and punitive damages. HOME asks for its activity and litigation expenses.

Plaintiffs allege that the Richmond Metropolitan Area, including Henrico County, is racially segregated in its housing patterns; that is, it contains identifiable "white" and "black" neighborhoods; that the defendants' practices of racial steering contribute to the maintenance of existing neighborhood segregation and inhibit the development of stable, racially integrated neighborhoods; that defendants treat white and non-white prospective lessees differently based on their race or color; that defendants have engaged in practices to the detriment and injury of the plaintiffs and other similarly situated persons by consistently showing only prospective white customers rental units in buildings occupied primarily by white tenants, by consistently refusing or failing to show black prospective customers rental units in buildings occupied primarily by white tenants, and, on occasion, by failing or refusing to show prospective black customers rental units in less racially segregated buildings.

The complaint alleges that tester plaintiff Coleman (because of his race) and white tester Willis have been denied the right to rent real property in Henrico County and therefore have been deprived of the advantages and con-

veniences they would have enjoyed from living in this area, namely the right to the important social, professional, business, economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices.

It is also alleged that all the members of the class have been deprived of the right to the important social, professional, business, economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices, in violation of the Fair Housing Act.

The complaint alleges that HOME has had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices; and that HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices in violation of the Fair Housing Act.

STANDING

All plaintiffs have standing. Willis and Coleman have standing as testers but, even if this were not so, they have alleged sufficient personal harm to give them standing. HOME has Article III standing both as a representative of its members and on the basis of its allegations of harm to the corporation.

I
TESTERS

The question of standing for testers under the Fair Housing Act was left unanswered by the Supreme Court in its

seminal pronouncement on Fair Housing Act standing in *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91 (1979). The involvement of Willis and Coleman and their treatment by the defendants, however, presents strong public policy reasons for resolving that question in favor of Fair Housing Act standing for bona fide testers. The basic appropriateness of affording them standing to litigate todays issues of fair housing parallels the importance of the right to litigate the crucial issues decided in *Pierson* v. *Ray,* 386 U.S. 547 (1967) and *Evers* v. *Dwyer,* 358 U.S. 202 (1958). There are, of course, distinctions in the cases but the binding similarity is that they all treat the right of testers to challenge actions frustrating vital public policy where in most instances no other effective challenge could be mounted. The testers in *Pierson* actively sought integrated admission to the "whites only" section of the bus station; in *Evers* they occupied seats in the forbidden section of the bus. While the testers here only inquired about apartment rentals and did not apply to rent an apartment, their actions serve the same fundamental purposes as the testers in *Pierson* and *Evers.* Willis and Coleman purposefully approached the defendants as the first step in eradicating racial discrimination in housing, a social evil so antithetical to a free and democratic society that Congress has devised special and sharp tools for its excision. Housing, as a personal choice right of a citizen, is no less important than other rights affecting human dignity, such as unfettered access to public facilities. In *Evers* the Court wrote per curiam:

> A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of

> the statute which imposes the disability. (Citation omitted). That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant. (Citations omitted).

Id. at 204.

In *Pierson* a group of clergymen traveled to Jackson, Mississippi for the sole purpose of testing their rights to unsegregated public accommodations. The Court said, "[t]he petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under § 1983." 386 U.S. at 558 (footnote omitted).

In *Pierson* and *Evers* the court said in effect that since the plaintiffs were not representing injuries to third parties but rather to themselves there was no issue of prudential limitations. Here Willis and Coleman, in their capacity as employed testers, unquestionably assert the rights of third parties. As explained in *Warth*[2] however, Congress eliminated prudential considerations in Fair Housing Act cases, intending that standing be allowed as broadly as constitutionally permitted by Article III. *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 109 (1979); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972).

The breadth of Congressional protection against housing discrimination is apparent from the language of Section 3604(d), 42 U.S.C. § 3604(d) which makes it unlawful "[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." This prohibition against providing false

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[2] *Id.* at 509-10.

information creates a concomitant right to receive correct housing information without regard to race or color. Individuals illegally denied housing by subterfuge are, by the nature of the wrongful act, less able than others in our society to require enforcement of the Civil Rights Act through private litigation as "private attorneys general". There is no rational reason why their bona fide surrogates cannot pursue their cause. If the defendants had supplied the testers truthful information—that apartments were available both in Colonial Apartments and Camelot Townhouse Apartments—there would have been no injury and the social reform legislated by Congress would have been advanced without resort to the courts.

It is not necessary to formulate a general rule circumscribing standing for tester plaintiffs. Suffice it to say that they occupy a narrow island limited to areas fundamentally necessary for access to the federal courts as presented by *Pierson* and *Evers* or, as here, where Congress has recognized a similar deeply-grounded human right. The legislative design of the Fair Housing Act provides such broad standing for enforcement of the right. This is consistent with the *Trafficante* and *Bellwood* interpretation of the Fair Housing Act—maintaining the prophylactic quality of Article III limitations while recognizing the elasticity necessary to accommodate constitutional Congressional intent.

II

DIRECT INJURY TO "TESTERS"

Coleman and Willis also alleged violations of their right to enjoy the fruits of an integrated community in much the same language as the individual plaintiffs in *Trafficante* and *Bellwood*. This similarity gives weight to their status as bona fide "testers". These allegations, moreover, are

sufficient to grant standing for each of them as individual plaintiffs.

The Supreme Court in *Warth*, discussing an alleged violation of 42 U.S.C. § 1981, stated:

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied."

Warth v. *Seldin*, 422 U.S. at 508.

The *Warth* opinion indicated a reservation as to whether the same ruling would have applied to a Fair Housing Act case.[3] *Trafficante* and *Bellwood* however decided standing under Fair Housing Act principles. Coleman and Willis both claim deprivation of community rights in language at least as specific as approved there. They are residents of Henrico County included within the Richmond Metropolitan area. They claim the practice of racial steering has adversely affected the area in which they live and that the defendants have engaged in racial steering. Black tester Coleman claims she has been denied the right to rent property and to make and enforce contracts for the lease of real estate in Henrico County by defendants' action; has been deprived of the advantages and conveniences she would have enjoyed from living in the area, and has been deprived of the right to the important social, professional, business, economic, political, and aesthetic benefits of in-

[3] *Id.* at 513 n. 21.

terracial associations that arise from living in integrated communities free from discriminatory housing practices. White tester Willis claims he has been deprived of the same rights afforded by integrated communities. Both Coleman and Willis claim they have been subjected to a "dual" housing market in Henrico County on the basis of race or color by defendants' practices.

Housing discrimination injuries are not inflicted so neatly that the wounded can always be identified as individuals, representatives of individuals, or members of a community. The Supreme Court's expressions on standing thus are not rigidly compartmentalized as governing exclusively those directly injured, testers, or members of the community.

In *Trafficante* v. *Metropolitan Life Insurance, Co.*, 409 U.S. 205, 208 (1972), one black and one white tenant of an apartment complex complained of discriminatory rental practices, alleging:

> (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being "stigmatized" as residents of a "white ghetto". (Footnote omitted).

The Court held plaintiffs were persons "aggrieved" as defined in Section 810(a) of the Fair Housing Act, i.e., any person who claims to have been injured by a discriminatory housing practice. In this context Justice Douglas said:

> The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, "the whole

> community," 114 Cong. Rec. 2706, and as Senator Mondale who drafted § 810(a) said, the reach of the proposed law was to replace the ghettos "by truly integrated and balanced living patterns."

Id. at 211.

In *Bellwood* four white plaintiffs, who were residents of the target area of Bellwood, alleged that discriminatory housing practices deprived them of "the social and professional benefits of living in an integrated society." 441 U.S. at 111. The Court noted the allegation was similar to that in *Trafficante*, where it was held that the injury alleged was sufficient to satisfy the constitutional standing requirement of actual or threatened harm. The broad definition of "person aggrieved" under § 810 of the Fair Housing Act was considered a clear indication of Congressional intent to permit liberal standing. The Court considered this to be a part of the scheme of the Act to encourage enforcement by complaints from private persons or "private attorneys general" which are "the main generating force" in "vindicating a policy that Congress considered to be of the highest priority." The 'private attorneys general' role under the Civil Rights Act of 1968 serves not only to protect "those against whom a discrimination is directed but also those whose" daily lives are affected. *Trafficante, Id.* at 209 & 211.

We have neither the power nor the desire to minimize the "case and controversy" requirements of Article III. The modern decisions have not. The constitutional inquiry necessary in confining litigation to proper parties over appropriate disputes remains as generally stated in *Warth* v. *Seldin*, 422 U.S. 490, 498-99 (1974), *citing*, *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)—"whether the plaintiff has 'alleged such a personal stake in the outcome of the

controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."

III
ORGANIZATIONAL STANDING

The plaintiff HOME claims its members have been deprived of community advantages by defendants' actions in the same language utilized by Coleman and Willis. HOME therefore has representational standing to litigate these claims on behalf of its members.[4] *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333 (1977), summarizes the requirements of representational standing where the organizational plaintiff has not itself suffered injury:

> [W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Id. at 343.

See also Warth v. *Seldin*, 422 U.S. at 511 wherein the Court said:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.

[4] It however can not represent its members in individual claims for damages where both the fact and extent of injury would require individualized proof. *Warth* v. *Seldin*, 422 U.S. at 511 & 515-16.

Id. at 511.

The complaint also alleges sufficient injury to HOME as an entity to confer standing on it directly. It claims HOME has been frustrated in its efforts to assist equal access to housing through counseling and other referral services. HOME has devoted significant resources identifying and counteracting the defendants' racially discriminatory steering practices.

This is more than the protestations of general interest found to be insufficient for standing in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972) and *Warth* v. *Seldin, supra*, and by the court of appeals in *Bellwood*, 569 F.2d 1013, 1917 (1978). Although not equaling, it approaches the injury suffered by the nonprofit developer in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp*, 429 U.S. 252 (1977). *See also Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *Heights Community Congress* v. *Rosenblatt Realty, Inc.*, 73 F.R.D. 1 (N.D. Ohio 1975). In *Arlington Heights* the Court said:

> MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest. See *Sierra Club* v. *Morton, supra*, at 739. The specific project MHDC intends to build, whether or not it will generate profits, provides that "essential dimension of specificity" that informs judicial decisionmaking. *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 221 (1974).

Id. at 263.

Although HOME's goals cannot be equated with bricks and mortar, they are functional, requiring identifiable action and the expenditure of effort and funds which may result in

success or failure in achieving its objectives. Its "projects" therefore "provides that 'essential dimension of specificity' that informs judicial decision making," as described in *Arlington Heights.*

IV
THE TARGET AREA

The defendants in oral argument contended that the City of Richmond or Henrico County is too large[5] as a matter of law to comprise a "target area" of housing discrimination. The "target area" in *Trafficante* was an apartment complex of 8,200 tenants, while the population of Bellwood in which the target neighborhood was located was estimated at 20,969. *Gladstone, Realtors* v. *Bellwood, Id.* at 113 n. 27. As the Court said in *Bellwood,* however:

> The constitutional limits of respondents' standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks rather than apartment buildings. Rather, they are determined by the presence or absence of a "distinct and palpable injury," *Warth* v. *Seldin,* 422 U.S., at 501, to respondents resulting from petitioners' conduct. A "neighborhood" whose racial composition allegedly is being manipulated may be so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident. The presence of a genuine injury should be ascertainable on the basis of discrete facts presented at trial. (Footnote omitted).

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[5] The population of the City of Richmond is 219,883 while that of Henrico County, Virginia is 172,922. Department of Commerce, Bureau of Census, Current Population Reports, Special Census of the Richmond, Virginia areas, April 4, 1978, p. 1, published August, 1979.

Id. at 114.

The district court's dismissal prevented plaintiffs Coleman, Willis, and HOME from proceeding to trial. Since allegations bearing on standing must be actualized by proof, the defendants may, on remand, contest these as any other facts. The complaint in the instant case does not specifically allege that the discrimination practiced at Colonial Courts and Camelot Townhouse Apartments affect the area where the testers reside. The district court may require the complaint to be amended for such allegation necessary to facilitate production of evidence bearing on this issue. If the allegations are not supported by proof at trial, the case may be terminated for lack of standing at an appropriate stage of the trial. *Id.* at 115 n. 31.

V

STATUTE OF LIMITATION

The defendants contend and the district court held that all the alleged Fair Housing Act violations except the one of July 13, 1978, involving Coles are time-barred by the statute of limitation contained in 42 U.S.C. § 3612(a). The applicable part of that statute states simply: "a civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred."

It is conceded that each of the specific acts of the defendants except the one of July 13 transpired more than 180 days before the complaint was filed. The defendants contend that each discrete act constitutes an "occurrence" and an action is barred as to each specific act after 180 days. The plaintiffs contend that the "occurrence" is the defendant's continuing practice of racial steering and that the 180 days commences with the last act—in this case the violation of July 13. We agree with the plaintiffs and hold that none of

the allegations in the complaint are time-barred by the 180-day provision.

Hickman v. *Fincher*, 483 F.2d 855 (4th Cir. 1973), affirmed a district court ruling that barred an action commenced more than 180 days after the last act of discrimination. *Hickman*, however, is not dispositive because there was no allegation of a continuing violation or a pattern of violations.

There is an appealing simplicity equating "occurrence" to a discrete act. Not simple, however, are the social ills targeted by Congress nor the actions of putative landlords. It is not isolated instances of discrimination that are the primary focus of the statute—rather it is a generalized practice of housing discrimination.

The Court of Appeals for the Seventh Circuit considered a similar contention in *Baker* v. *F & F Investment*, 420 F.2d 1191 (7th Cir. 1970). Negro purchasers of real estate on installment contracts alleged they were burdened with discriminatory prices and terms. The defendants there argued that they had performed only a single action—the execution of the contract—and that this was time-barred. The court disagreed, holding the violations continued during the lives of the contracts:

> Plaintiffs have alleged wrongs committed by defendants which continue during the entire lives of the individual purchase contracts. They have alleged a conspiracy among defendants, the object of which was the establishment of a continuing relationship with individual plaintiffs. . . . Because of the continuing nature of the overt acts alleged, the statutes of limitations do not commence to run when the contracts were executed but when they terminate.
>
> . . . .
>
> [T]he touchstone of our inquiry must be the nature and

> extent of defendants' behavior, not the duration of plaintiff's injury.

Id. at 1200 (Citation omitted).

See Cedeck v. *Hamiltonian Federal Savings & Loan Association*, 551 F.2d 1136 (8th Cir. 1977) and *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). See also *Fair Housing Council of Bergen County, Inc.* v. *Eastern Bergen County Multiple Listing Service, Inc.*, 422 F.Supp. 1071, 1078 (D.N.J. 1976) where the New Jersey District Court said, in considering the § 3612(a) time limitation:

> Congress obviously included such a provision to prevent the district courts from being used to exhume stale grievances. No such considerations apply to the case at bar. Plaintiffs have alleged what amounts to a continuing conspiratorial practice on the part of multiple, influential defendants. Taking the complaint as true, as is required at this early juncture, plaintiffs' grievance is anything but stale. It is fresh and immediate.

See Stingley v. *City of Lincoln Park*, 429 F.Supp. 1379 (E.D. Mich. 1977).

The Sixth Circuit in *Hunter* v. *Atchinson*, 466 F.2d 490 (6th Cir. 1972), held that the facts of a given case would determine whether the language of § 3612(a) means the statute runs from the first or the last of the discriminatory acts. That opinion reversed the district court's dismissal and remanded for an evidentiary hearing noting "[t]his case may ultimately require us to construe the Congressional purpose involved in the limitation. . . ." *Id.* at 491.

There is no reason to differentiate the purpose of the § 3412(a) statute of limitation from general statutes barring litigation after a lapse of time. Lawmakers protect

litigants from perpetual threats of lawsuits and protect the integrity of enlightened fact finding. These policies do not militate against our holding. The instant controversy was continuing—the evidence easily obtainable. It is not unfair to require these defendants to litigate the matter when they were, according to the complaint, acutely aware of their continuing activities. Coles, Coleman, Willis and HOME were involved in active, consecutive, connected, and continuing attempts to secure or determine compliance with the Fair Housing Act. The defendants, just as resolutely, continued their practice of prohibited discrimination against these specific individuals. This, under the circumstances, is a continued relationship between the defendants and the plaintiffs and a continued violation of § 3604 so that the violations continued to "occur" until the last act of July 13, 1978. By the very nature of these offenses, "occurrence" must be thus construed to effect the remedial purposes of the act.

Reversed and Remanded.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

PAUL ALLEN COLES,
et al

v.

HAVENS REALTY CORPORATION,
et al

Civil Action No. 79-0024-R

ORDER

In accordance with the memorandum this day filed, the claims of plaintiffs Sylvia Coleman, R. Kent Willis, and Housing Opportunities Made Equal are hereby DISMISSED for failure to state a claim on which relief may be granted. In all other respects, defendants' motion to dismiss filed 31 January 1979 is hereby DENIED.

Let the Clerk send a copy of this order and memorandum to all counsel fo [sic] record.

/s/ D. DORTCH WARRINER
United States District Judge

Date: 16 February, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

PAUL ALLEN COLES,
et al

v.

HAVENS REALTY CORPORATION,
et al

Civil Action No. 79-0024-R

MEMORANDUM

This matter is before the Court on defendants' motion to dismiss of 31 January 1979. The time allotted by the Local Rules for plaintiffs' reply to this motion has expired, and plaintiffs have not responded by memorandum or otherwise. Accordingly, the motion is now ripe for disposition. The defendants' motion has several parts, each of which will be considered separately.

Defendants state that all of plaintiffs' claims but one are based on acts of discrimination which occurred more than 180 days before the filing of the complaint in this case. Accordingly, defendants argue, all claims under the Fair Housing Act of 1968 except that based on the alleged discriminatory act on 13 July 1978 are barred by the applicable statute of limitations, 42 U.S.C. § 3612(a). This claim is well taken, and the action will be dismissed as to all barred claims. The Court notes that none of plaintiffs' claims are time-barred under the two-year statute of limitations applicable to 42 U.S.C. § 1982.

Defendants argue that the corporate plaintiff, Housing Opportunities Made Equal (HOME) is not a proper party plaintiff to this law suit. The Court believes that the law is clear that HOME is not a proper party to this action and cannot be accorded any relief by this Court. *Warth* v. *Seldin*, 422 U.S. 490 (1975); *TOPIC* v. *Circle Realty*, 532 F.2d 1273 (9th Cir. 1976). Accordingly HOME will be dismissed as a party plaintiff.

Defendants claim that the "tester" plaintiffs (Coleman and Willis), the persons who allegedly sought to rent from defendants in order to prove a pattern of discrimination, have suffered no injury and thus are entitled to no relief. Plaintiffs' complaint makes it clear that Coleman and Willis did not attempt in good faith to rent residential property from any defendant, but instead sought only to develop evidence for use in this law suit. Their action seeks to vindicate the rights of third parties, dispite [sic] their allegation of deprivation of benefits from interracial associations. In asserting the claim based on these deprivations, Coleman and Willis assert no more than the general public interest. Furthermore, there is no allegation that absent the defendants' discriminatory practices, Coleman and Willis would reside in integrated communities. Thus, Coleman and Willis must be dismissed as parties plaintiff.

Defendants argue that none of the plaintiffs allege that they actually offered to rent an apartment from any defendant, and thus may not maintain an action or denial of rental housing. However, the gravamen of plaintiffs' complaint is that when black persons inquired as to vacancies, they were told that none existed. Under these circumstances, no affirmative offer to rent need be shown in order to state a claim.

Defendants suggest that Coleman, Willis, and HOME are

not proper class representatives. The Court's ruling that these plaintiffs' claims be dismissed make it unnecessary to consider this claim. However, the Court does not agree that plaintiff Coles cannot represent a class merely because his claim is based on a single individual act of discrimination. Further, while plaintiffs' failure to file their complaint herein until some claims had been time-barred—and their failure to respond to defendants' motion and brief—are indications that plaintiffs may not adequately represent the interest of the class, these matters are ones for the Court to consider on a motion for class certification after there has been an opportunity for discovery of the question of class certification to determine the factual questions raised by defendants' contentions.

An appropriate order shall issue.

/s/ D. DORTCH WARRINER
United States District Judge

Date: 16 February 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

PAUL ALLEN COLES, et al

v.

HAVENS REALTY CORPORATION, et al

Civil Action No. 79-0024-R

ORDER

As is made clear by Local Rule 11(F) and (P), applications for extensions of time are granted by the Court, not by opposing counsel. Accordingly, the motion of plaintiffs Coleman, Willis, and Housing Opportunities Made Equal to reconsider, filed herein on 16 February 1979, is DENIED and the brief tendered on 20 February 1979, and mistakenly marked "filed" by the Clerk, will not be considered.

And it is so ORDERED.

Let the Clerk send a copy of this order to all counsel of record.

/s/ D. DORTCH WARRINER
United States District Judge

Date: 22 February 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

PAUL ALLEN COLES, SYLVIA COLEMAN,
R. KENT WILLIS, and on behalf of all others
similarly situated, and
HOUSING OPPORTUNITIES MADE EQUAL,
a Virginia Corporation,

Plaintiffs,

v.

HAVENS REALTY CORPORATION,
a Virginia Corporation,
and
ROSE JONES,

Defendants.

Civil Action No. 79-0024-R

ORDER FOR FINAL JUDGMENT

On the prior Order of this Court, dated and entered February 16, 1979, it appearing to the Court that there is no just reason for delay in entering final judgment on Defendants' Motion to Dismiss the Claims of plaintiffs, Sylvia Coleman, R. Kent Willis and Housing Opportunities Made Equal it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

ORDERED that a final judgment be entered herein that the claims of these plaintiffs are dismissed.

/s/ D. DORTCH WARRINER
United States District Judge

Date 6 March 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

PAUL ALLEN COLES, SYLVIA COLEMAN,
R. KENT WILLIS, and on behalf of all others
similarly situated, and
HOUSING OPPORTUNITIES MADE EQUAL,
a Virginia Corporation,

Plaintiffs,

v.

HAVENS REALTY CORPORATION,
a Virginia Corporation,
and
ROSE JONES,

Defendants.

Civil Action No. 79-0024

COMPLAINT

(For Declaratory Judgment, Damages and Injunctive Relief)

1. This is an action for a declaratory judgment, damages and injunctive relief to redress the deprivation of rights, privileges and immunities of the plaintiffs, and all other members of the class they represent, from the acts, patterns, practices and policies of the defendants that restrain, limit, classify, segregate and otherwise discriminate on the basis of race or color, in the rental of residential housing units in Henrico County, Virginia. This action involves the pattern and practices of defendants of denying housing on the basis of race and of racial steering, a practice by which real

estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups, a practice in violation of the statutes set forth herein. This action arises under 42 U.S.C. §3601 and §3604 (the Fair Housing Act of 1968), and 42 U.S.C. §1982 (the Civil Rights Act of 1866). This Court has jurisdiction of this action under 42 U.S.C. §3612(a), 28 U.S.C. §§1331, 1337, 1343(4) and 2201.

2. The individual plaintiffs are members of a class composed of all persons who have rented or sought to rent residential property in Henrico County, Virginia, and who have been, or continue to be, adversely affected by the acts, policies and practices of defendants complained of herein.

3. The number of persons in the class represented by the individual plaintiffs ("plaintiff class") is so numerous that joinder of all members is impracticable.

4. There are questions of law and fact common to the plaintiff class. These questions include, among others, whether or not the practices engaged in by defendants in Henrico County deprive the members of the plaintiff class of civil rights secured to them by the Fair Housing Act of 1968 and the Civil Rights Act of 1866. The method by which the defendants violate these statutes and engage in the practice of racial steering is one of the questions of fact common to the plaintiff class.

5. The claims of the representative plaintiffs are typical of the claims of the plaintiff class. The representative plaintiffs will fairly and adequately protect the interests of the

plaintiff class because their interests and those of the plaintiff class are coextensive. Counsel for the representative plaintiffs are capable of conducting the litigation commenced by the filing of this complaint.

6. Defendants have acted or refused to act on grounds generally applicable to the plaintiff class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the plaintiff class as a whole.

7. The individual plaintiffs to this action are all residents of the City of Richmond or Henrico County and have been injured by the discriminatory acts of the defendants. Plaintiff Paul Allen Coles is a black man who has attempted to rent residential property from the defendants ("renter plaintiff"). The remaining individually-named plaintiffs, Sylvia Coleman, a black woman, and R. Kent Willis, a white man ("tester plaintiffs"), have consulted defendants with regard to available rentals in the course of their employment with Housing Opportunities Made Equal to determine whether or not defendants have practiced racial steering in the rental housing market.

8. Housing Opportunities Made Equal ("HOME") is a nonprofit corporation organized under the laws of the State of Virginia with its principal place of business at 503 East Main Street, Richmond, Virginia, 23219. Its purpose is to make equal opportunity in housing a reality in the Richmond Metropolitan Area. Its membership is multiracial and includes approximately 600 individuals. Its goals include the elimination of unlawful racially discriminatory housing practices that cause injury to its members, to all persons who seek to rent apartment units in the Metropolitan Area and to all persons who reside in the Metropolitan Area. HOME seeks to assure to all such persons the right to the important social, professional, business, eco-

nomic and political benefits of interracial associations that arise from living in integrated communities. The activities in which HOME engages includes [sic], but are not limited to, the following:

(a) Seeking to assist and aid individuals of all races in obtaining housing throughout the Richmond Metropolitan Area, through the operation of a housing counselling [sic] service;

(b) Investigating allegations of discrimination and referring complaints to appropriate state and federal agencies;

(c) Conducting independent investigations of real estate brokers located in the Richmond Metropolitan Area to determine whether equal opportunity in housing is available, and taking such steps as it may deem necessary to assure such equal opportunity and to eliminate racially discriminatory housing practices.

9. Defendant Havens Realty Corporation is a Virginia Corporation with its principal place of business at Camelot Townhouses and Colonial Court Apartments, 9108-A Quioccasin Road in Henrico County, Virginia. At all times relevant to this action, Havens Realty Corporation has been engaged in the business of real estate brokerage services as to apartment rental units in Richmond. Defendant Rose Jones is an employee of Havens Realty Corporation.

10. Like other metropolitan areas throughout the United States, the Richmond Metropolitan Area, including Henrico County, has been marked by racially segregated residential housing patterns. Neighborhoods have reflected the impact of segregation resulting from the actions of private individuals and groups, restrictive covenants, zoning and other factors, so that area neighborhoods can generally be identified as "white" or "black" neighborhoods. The practice or [sic] "racial steering" engaged in by these defendants, contributes to maintaining existing neighborhood segregation

and inhibits the development of stable racially integrated neighborhoods.

11. Defendants treat differently white and non-white prospective lessees on the basis of race or color. Defendants have engaged in practices to the detriment and injury of the plaintiffs herein and others similarly situated by consistently showing only prospective white customers ("customers") rental units in a building occupied primarily by white tenants, by consistently refusing or failing to show black customers ("customers") rental units in the aforementioned building occupied primarily by white tenants, notwithstanding the "listings" for rentals in that building that fall within the category of housing sought by such black customers, and on occasion by failing or refusing to show prospective black customers rental units in a less racially segregated building or by showing such prospective black customers only rental units in the less racially segregated building.

12. The patterns, practices, acts and policies of defendants, as hereinabove alleged, in restraining, limiting, classifying, segregating and otherwise discriminating on the basis of race or color in the rental of residential real estate in Henrico County, and in the rendition of real estate brokerage services in connection therewith, have caused injury to the plaintiff class. Renter plaintiff Coles has been denied the right to rent real property in a predominantly white-occupied building in Henrico County in violation of the 1866 Civil Rights Act, 42 U.S.C. §1982 and the Fair Housing Act of 1968, 42 U.S.C. §3604, in the following manner: On July 13, 1978, plaintiff Coles visited the office of Havens Realty Corporation located at the Camelot Townhouses to inquire into available apartments at Camelot Townhouses. Camelot Townhouses is an apartment complex predominantly occupied by whites. Coles was informed that no apartments were available in the Camelot complex.

He was told that an apartment was available in the adjoining Colonial Court complex. The Colonial complex is integrated. That same day white tester John Barr telephoned the Havens office and was informed by defendant Rose Jones that an apartment was available in Camelot Townhouses. That same day John Barr visited the Havens office and was informed by Susan Newton, then an employee of Havens, that an apartment was available in the Camelot Townhouses.

13. Defendants have evidenced a pattern, practice and policy of racial steering to the specific injury of tester plaintiff Sylvia Coleman, in the following manner:

(a) On March 14, 1978, black tester Sylvia Coleman asked about vacancies at Colonial Court but was told by the defendant Rose Jones that nothing was available; that same day white tester R. Kent Willis asked about vacancies at Colonial Court and was told by defendant Rose Jones that two apartments were available, both at Colonial Court and Camelot Townhouse apartments;

(b) On March 21, 1978, black tester Sylvia Coleman asked generally about vacancies in apartments in Henrico County but was told by defendant Susan Newton that nothing was available; that same day white tester R. Kent Willis asked about vacancies at apartments in Henrico County and was told by defendant Rose Jones that an apartment was available at Colonial Court;

(c) On March 23, 1978, black tester Sylvia Coleman asked Rose Jones about vacancies in defendant's buildings but was told by employee Susan Newton that nothing was available; that same day white tester R. Kent Willis asked about vacancies in the defendant's apartment complexes and was told by employees Rose Jones and Susan Newton that an apartment was available at Colonial Court;

(d) On July 6, 1978, black tester Sylvia Coleman

asked about vacancies at the Camelot Townhouses complex, but was told that nothing was available at Camelot Townhouses; black tester Coleman was told that there was a vacancy at Colonial Court apartments; that same day white tester John Barr asked about vacancies at Camelot Townhouse apartments and was told an apartment was available at Camelot Townhouse apartments.

14. Renter plaintiff Paul Allen Coles and tester plaintiff Sylvia Coleman have, because of their race, been denied the right to rent real property in Henrico County, Virginia, and therefore have been deprived of the advantages and conveniences they would have enjoyed from living in this area and the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices. These individual plaintiffs and the members of the class they represent have been deprived of the right to live in communities that are not limited, classified or segregated on the basis of race or color, in violation of the Fair Housing Act of 1968, 42 U.S.C. §3601, *et seq.*; and the right to make and enforce contracts for the lease of real estate, in violation of the Civil Rights Act of 1866, 42 U.S.C. §1982.

15. White tester plaintiff R. Kent Willis and the members of the class he represents, have been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices, in violation of the Fair Housing Act of 1968, 42 U.S.C. §3601, *et seq.*

16. Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to

identify and counteract the defendant's racially discriminatory steering practices. HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices, in violation of the Fair Housing Act of 1968, 42 U.S.C. §3601, *et seq.*

17. The individual plaintiffs and the class they represent have been subjected to acts, patterns, practices and policies of the defendants, which have created, cultivated and perpetuated a discriminatory "dual" housing market in Henrico County by limiting, classifying and segregating said communities on the basis of race or color, in violation of the Fair Housing Act of 1968, 42 U.S.C. §3601, *et seq.*

18. The plaintiffs have no adequate remedy at law. The individual plaintiffs and the class they represent have suffered, are now suffering and will continue to suffer irreparable harm and injury by the unlawful policies and discriminatory practices of the defendants. The infringement upon the rights of the plaintiffs and the class they represent is grave, immediate and continuing.

WHEREFORE, the plaintiffs pray that this Court enter a judgment:

(a) declaring that defendants' acts, practices and policies complained of herein violate rights secured by the Civil Rights Act of 1866, 42 U.S.C. §1982, and Title VIII of the 1968 Civil Rights Act, 42 U.S.C. §3601, *et seq.;*

(b) enjoining the defendants, their agents, employees, successors, assigns, and those acting in active concert, combination or participation with them, from engaging in policies and practices which deprive plaintiffs and the class they represent of rights secured by 42 U.S.C. §§1982 and 3601, *et seq.*, including, but not limited to, a judgment:

(i) enjoining defendants from refusing or failing to show or rent any housing unit owned or managed by the defendants to any person because of race or color;

(ii) enjoining defendants from steering or channelling any prospective renter toward or away from any particular rental unit, complex or neighborhood on account of race or color;

(iii) enjoining defendants from discriminating against any person in the terms, conditions, or privileges of renting, or in the provision of services in connection therewith; and

(iv) enjoining defendants from representing to any person, because of race or color, that any rental unit is not available for inspection or rental when such unit is in fact so available;

(c) ordering defendants to take affirmative action supervised by this Court, to overcome the effect of their past discriminatory actions, such affirmative action to include, *inter alia*:

(i) the soliciting and encouraging of blacks to rent units in predominantly white communities and whites to rent such units in predominantly black and integrated communities;

(ii) the adequate advertising in appropriate publications and circulation of information concerning apartments available in defendants' files;

(iii) the adoption of a uniform system of rules, regulations, codes, etc., together with enforcement procedures, designed to ensure that defendants' past discriminatory actions are not repeated or continued, including the adoption of a policy of hiring personnel in its real estate office without regard to race; and

(iv) the prompt reporting in written form by defendants of such information as the Court deems necessary to enable the efficient monitoring of the defendants' compliance with

other parts of the Court's order and the Fair Housing Laws of the United States;

(d) awarding to renter plaintiff Paul Allen Coles the sum of $50,000 in actual damages and $100,000 in punitive damages for the violation of his rights by these defendants;

(e) awarding to each of the tester plaintiffs Sylvia Coleman and R. Kent Willis the sum of $1,000 in actual damages and $1,000 in punitive damages;

(f) awarding to HOME its expenses of testing and monitoring defendants' practices and its expenses pursuant to this litigation;

(g) awarding to plaintiffs their costs and reasonable attorney fees in this action; and

(h) granting such additional and further relief as the Court deems just and equitable.

Respectfully submitted,

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42 U.S.C. § 1982

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 3613

§ 3613. Enforcement by the Attorney General; issues of general public importance; civil action, Federal jurisdiction; complaint; preventive relief

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

Office-Supreme Court, U.S.
FILED
MAR 2
ALEXANDER L. STEVAS,
CLERK

No. 80-988

In The

Supreme Court of the United States

October Term, 1980

HAVENS REALTY CORPORATION and
ROSE JONES,

Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

HEIGHTS COMMUNITY CONGRESS v. *HILLTOP REALTY, INC.*, No. C79-422 (N.D. Ohio, December 31, 1980) DEMONSTRATES THE IMPORTANCE OF PROMPT RESOLUTION OF TWO QUESTIONS PRESENTED IN THE CASE AT BAR 1

Allegations Necessary to Confer Standing on an Individual Plaintiff 2

Allegations Necessary to Confer Standing on an Organizational Plaintiff 3

Conclusion 5

TABLE OF AUTHORITIES

Cases

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 2,4

Heights Community Congress v. *Hilltop Realty, Inc.*, No. C79-422 (N.D. Ohio, December 31, 1980) 1

Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) 3

Statutes

Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act), 42 U.S.C. §§ 3601 *et seq.* 2

In The

Supreme Court of the United States

October Term, 1980

HAVENS REALTY CORPORATION and
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Petitioners,

vs.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

HEIGHTS COMMUNITY CONGRESS v. HILLTOP REALTY, INC., No. C79-422 (N.D. Ohio, December 31, 1980) DEMONSTRATES THE IMPORTANCE OF PROMPT RESOLUTION OF TWO QUESTIONS PRESENTED IN THE CASE AT BAR.

On December 31, 1980, the United States District Court for the Northern District of Ohio issued a memorandum opinion and order in *Heights Community Congress* v. *Hilltop Realty, Inc.*, No. C79-422 (N.D. Ohio, December 31, 1980) (hereafter *Hilltop Realty*), which was not available to counsel for petitioners when the petition for certiorari was filed.* In *Hilltop Realty*, as in the case at bar, various plaintiffs sought injunctive relief and monetary damages

*The Memorandum and Order is reprinted in its entirety in the Appendix.

against a real estate firm and its agents, charging them with racial steering. Defendants moved for summary judgment, contending that there were no genuine issues of material fact with respect to the plaintiffs' standing. The district court's order granting in part and denying in part the defendants' motion demonstrates the importance of resolving two important issues in the case at bar: (1) the nature of the allegations a plaintiff must make to base standing under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (hereafter Fair Housing Act), on deprivation of the benefits of interracial association, and (2) the basis for organizational standing under the Fair Housing Act.

Allegations Necessary to Confer Standing on an Individual Plaintiff

In determining whether each of the individual plaintiffs had standing under the Fair Housing Act, the district court relied on this Court's opinion in *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91 (1979) (hereafter *Bellwood II*). The court correctly held that in order for a plaintiff to base standing on a deprivation of the benefits of interracial association, he or she must be a resident of the targeted neighborhood (App. 20). Referring to footnote 25 of this Court's opinion in *Bellwood II,* 441 U.S. at 111 n.25, the district court stated:

> [I]t seems unlikely that summary judgment as to Perry would have been sustained if the Court believed that actual harm attached to Perry because of his residence in Bellwood, derived vicariously from the harm allegedly "done to the residents of the carefully described neighborhood in Bellwood in which four of the individual respondents reside[d]." Thus, residence in Bellwood, without residence in the target neighborhood, was not enough to create a claim of deprivation of the "social and professional benefits of living in an integrated society."

> In passing on the standing of each of the individual plaintiffs, the critical factor, therefore, will be whether the plaintiff is living in a neighborhood that is becoming a "predominantly Negro community." The absence of residence in such a community will deny the particular plaintiff the right to claim "the loss of social and professional benefits."

(App. 20). Thus, in the context of the facts alleged in *Hilltop Realty*, the court denied standing to individuals whose specific neighborhoods did not show the impact of the resegregation effect claimed to have been the result of defendants' steering. This result is in direct conflict with the Fourth Circuit's ruling in the case at bar where the individual plaintiffs were found to have standing even though they only alleged residence in the City of Richmond or Henrico County and alleged no credible facts connecting defendants' alleged steering with the neighborhood in which they reside.

More importantly, *Hilltop Realty* demonstrates the critical nature of the questions presented in the case at bar. This court's decisions in *Bellwood II* and *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) have made clear that standing may be based on allegations that a plaintiff has been deprived of the benefits of interracial association. The Fourth Circuit's opinion in the case at bar suggests that *any* plaintiff who makes this conclusory allegation, no matter how incredible, and in the absence of any specific allegations linking the acts complained of and the injury, has standing. *Hilltop Realty* correctly limits standing to those plaintiffs alleging a credible link between their own neighborhoods and defendants' alleged discrimination. The lower courts require guidance on this important question.

Allegations Necessary to Confer Standing on an Organizational Plaintiff

Furthermore, in *Hilltop Realty*, a housing organization, Heights Community Congress, sought standing in its own right, alleging that it had been injured by defendants' alleged racial steering because it had "expended funds for the purpose of promoting and maintaining an open and integrated community" (App. 27). Recognizing the conflict between the Fourth Circuit's decision in the case at bar and the Seventh Circuit's decision in *Village of Bellwood* v. *Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979) (hereafter *Bellwood I*) (App. 31), the district court specifically declined to follow *Bellwood I* in holding that Heights Community Congress had standing. Instead, the district court followed the Fourth Circuit's decision in the case at bar. Interestingly, although the district court recognized that "voluntary expenditures of time and energy, even personal funds, to advance these causes, however worthy, 'constitutes an abstract injury, not judicially cognizable in the assessment of [an individual] plaintiff's standing,'" (App. 25), the court affirmed the organization's standing based on just such an "injury." While attempting to distinguish *Bellwood I*, the court's opinion actually conflicts with it.

Lower courts should not be forced to guess which of two conflicting circuit court decisions should be followed on so crucial an issue as the standing of organizations to sue under the Fair Housing Act. As evidenced by *Hilltop Realty*, the question is a recurring one which must be resolved promptly.

CONCLUSION

In conclusion, *Hilltop Realty* demonstrates that the important and recurring questions raised in the case at bar need to be resolved now to provide guidance to courts and litigants as to the scope of standing under the Fair Housing Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that six (6) copies of the foregoing Supplement to Petition for Writ of Certiorari with Appendix have been served by mail on counsel for respondents, addressed as follows: three (3) copies to Daniel M. Singer, Theodore C. Hirt, Vanessa Ruiz and Dennis J. Riley, Fried, Frank, Harris, Shriver & Kampelman, 600 New Hampshire Avenue, N.W., Suite 1000, Washington, D.C. 20037, and three (3) copies to James F. Stutts, McSweeney, Stutts & Burtch, 121 Shockoe Slip, Richmond, Virginia 23219.

APPENDIX

App. 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

C79-422

HEIGHTS COMMUNITY CONGRESS, et al.
Plaintiffs,

v.

HILLTOP REALTY, INC., et al.
Defendants.

Filed December 31, 1960, 3:39 P.M. in the United States District Court, Northern District of Ohio, Eastern Division

MEMORANDUM AND ORDER

THOMAS, J.

Asserting jurisdiction under 42 U.S.C. §§ 3612 and 3617 and claiming violations of sections 3604 and 3617, the Thirteenth Amendment, and 42 U.S.C. § 1982, plaintiff Heights Community Congress (HCC, "a community organization"), plaintiff City of Cleveland Heights ("a municipality"), and six individual plaintiffs ("black and white citizens"), seek injunctive relief and money damages against defendant Hilltop Realty, Inc. ("a real estate firm") and individual defendants (Hilltop's "agents"). Plaintiffs charge the defendants with

> racial steering and other racially discriminatory housing practices which otherwise make unavailable, deny and interfere with equal housing and educational opportunities.

Defendants move this court for summary judgment. Contending that "there are no genuine issues of material fact with respect to the issue of standing of the plaintiffs," defendants say they are entitled to judgment as a matter of law.

While the presence of the merits issue of motive and intent of defendants would militate against granting a summary judgment in a fair housing case, defendants correctly argue that "no such issues are involved in a motion directed toward the standing of plaintiffs." Disputing a contrary contention of the plaintiffs, defendants properly note that deposition testimony may be considered in a summary judgment ruling. Also, other discovery materials may be considered. Extensive discovery (interrogatories, depositions, production of documents) has been used in this case. These materials, but particularly the depositions and attached exhibits, have been examined in ruling upon defendants' "standing" motion. Pertinent is the Court's instruction in *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 90 [sic], 109 n.22 (1979) (hereafter *Bellwood II*), that the trial court should "accept as true the facts contained in . . . discovery materials for the purposes of the standing issue." Thus the record goes beyond the "material allegations of the complaint" which, of course, must be construed "in favor of the complaining party." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

I.

In *Warth* v. *Seldin*, *supra*, at 498, and approved in *Bellwood II*, *supra*, at 99, the Court defines the essence of the standing question as "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." In the dimension of the "constitutional limitations

on federal-court jurisdiction," and in the dimension of "prudential limitations on its exercise," the principle of standing is "founded in concern about the proper—and properly limited—role of the courts in a democratic society."

To satisfy Article III, the Court has variously articulated the Article's mandate. It is enough here to note the Court's Article III requirement that "the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Bellwood II, supra,* at 99.

Prudential limitations, which are court imposed ones, have taken two forms. First, the federal courts will not assume jurisdiction where the injury claimed is a generalized one, "shared in substantially equal measure by all or a large class of citizens. . . ." Second, jurisdiction is not to be assumed when the plaintiff is asserting the rights of third persons rather than the plaintiff's own rights (citations). *Warth* v. *Seldin, supra,* at 499; *accord, Bellwood II, supra,* at 100.

Bellwood II reiterates:

> Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one "who otherwise would be barred by prudential standing rules." *Warth* v. *Seldin, supra,* at 501.

Bellwood, supra, at 100. Congress may not "abrogate the Art. III minima: A plaintiff must always have suffered 'a distinct and palpable injury to himself'." *Id.*

It becomes necessary then to consider the specific legislation involved herein, Title VIII of the Civil Rights Act of 1968, 82 Stat. 81, as amended, 42 U.S.C. § 3601, *et.* [sic] *seq. Trafficante* v. *Metropolitan Life Insurance,* 409 U.S. 205 (1972), involved an action brought under section 810,

42 U.S.C. § 3610, which permits actions to be brought under section 810(d) by a "person aggrieved," defined in section 810(a) as "any person who claims to have been injured by a discriminatory housing practice." "With respect to suits brought under the 1968 Act . . . insofar as tenants of the same housing unit that is charged with discrimination are concerned," the Court concluded that there is "congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.*, at 289. This language was adopted from *Hackett* v. *McGuire Bros. Inc.*, 445 F.2d 442, 446 (3rd Cir. 1971), a suit brought under the Civil Rights Act of 1964.

In *Bellwood II*, 441 U.S. at 109, the Court rejected the argument that in section 812, 42 U.S.C. 3612, standing was limited to "direct victims of the conduct proscribed by Title VIII." The Court concluded:

> Standing under § 812, like that under § 810, is "as broa[d] as is permitted by Article III of the Constitution." *Trafficante*, 409 U.S. at 209.

In other words, prudential limitations on standing are erased under section 812 as well as under section 810. Only standing under Article III need be satisfied.

II.

Defendants argue that plaintiff Cleveland Heights lacks standing "because it is not a 'private person' within the terms of section 812, 42 U.S.C. § 3612." Captioned "Enforcement by Private Persons," section 3612 in part provides:

> (a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions

> in appropriate United States District Courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction.[1]

One might suppose that the Court's decision that the Village of Bellwood had standing to bring a civil action under section 812 approved the premise that the Village of Bellwood, although a municipal corporation, was nonetheless entitled to bring a section 812 civil action. However, the Court concluded that "the question whether Bellwood is a 'private person' entitled to sue under section 812 is not properly before us, and we express no views on it." *Bellwood II, supra,* at 109 n.21.

Acknowledging that the "text of (a) is silent as to who may enforce such rights," defendants contend that "the caption of section 3612 clearly limits enforcement of section 3612 to private persons."

The "title" to a legislative act may be utilized as a tool of statutory construction but only when the title does not "limit the plain meaning of the text" and when "it may be

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[1] Of the four designated sections, only section 3604 is here pertinent. Charging "racial steering and other racially discriminatory housing practices," plaintiffs allege that these activities "otherwise make unavailable, deny. . . equal housing. . . opportunities." Patently, plaintiffs rely on section 3604(a), which makes it unlawful to "otherwise make unavailable or deny, a dwelling to any person because of race, color."

Applying the "make unavailable or deny" language, the court in *United States* v. *Mitchell,* 580 F.2d 789, 791 (5th Cir. 1978) declared, "Steering blacks to a particular group of apartments in a complex effectively denies access to equal housing opportunities." Significantly, the court stressed the indirect scope of the language:

> The Fair Housing Act prohibits not only direct discrimination but practices with racially discouraging effects; steering evidences an intent to influence the choice of the renter on an impermissible racial basis. *Zuch* v. *Hussey,* 394 F.Supp. 1028 (E.D. Mich. 1975), *aff'd,* 547 F.2d 1168 (6th Cir. 1977).

Racial steering, it is concluded, is rendered unlawful by the "make unavailable or deny language" of section 3604(a).

of aid in resolving an ambiguity." *McGuire* v. *Commissioner*, 313 U.S. 1, 9 (1941).

Section 812(a) says that the "rights granted by sections . . . of this title may be enforced by civil actions." Section 812(a) does not specify who are the parties who may file those actions. Sections 812(b) and (c) use the word "plaintiff" several times. Thus, authority is granted a court of the United States to "appoint an attorney for the plaintiff" and to "award to the plaintiff actual damages." Nowhere do sections 812(b) and (c) modify the term "plaintiff." Since the text of section 812 plainly does not restrict who may be a party plaintiff, it cannot be said that an ambiguity is present. Hence, the section title "Enforcement by Private Persons" may not be employed to so limit the class of party-plaintiffs who may bring civil actions under section 812.

Focusing on the words "private persons" as used in the caption, the question is what is the intended scope of the word "persons"? In *Village of Bellwood* v. *Gladstone Realtors*, 569 F.2d 1013, 1020, n.8 (7th Cir. 1978) (hereafter *Bellwood I*), the court of appeals declared that "42 U.S.C. § 3602(d) does not limit 'person' to natural persons, but sets out a broad range of organizations, including 'corporations,' within the definition." Continuing, the court said: "The Village is a municipal corporation, and we see no reason, or at least defendants have shown none, to construe section 3602(d) to exclude that type of corporation." Since a corporation, and therefore a municipal corporation, is within the Act's definition of the word "person," Congress, by adding "private" as a modifier of "persons" in the caption, surely did not thereby intend to drain the word "persons" of its definitional substance. Yet, that would be the result if the modifier "private" is read as a preclusive congressional signal that only a private natural person (not even a public figure) may bring a civil action under section

812. A more reasonable construction of the section 812 caption is that without intending to restrict use of the section to private natural persons, Congress contemplated that section 812's direct access to the United States district courts to enforce the fair housing rights created by the four sections designated in section 812(a) would be availed of principally by private individuals. Thus in captioning section 812, "Enforcement by Private Persons," actions under section 812 usually would be brought by private persons acting as "private attorneys general." [2] Congress differentiated section 813 from section 812, captioning the section "Enforcement by the Attorney General" and authorizing section 813 "pattern and practice" suits by the public Attorney General.

III.

A.

Defendants assert that "the city fails to satisfy the constitutional standing requirements established in *Bellwood*."

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[2] In *Trafficante*, in which a private action was brought under section 810(d), Justice Douglas recognized that:

> Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the attorney general in the matter minimal, *the main generating force must be private suits* in which, the Soliciter General says, the complainants act not only on their own behalf but also as *"private attorneys general"* in vindicating a policy that Congress considered to be of the highest priority. The role of "private attorneys general" is not uncommon in modern legislative programs.

409 U.S. at 211 (emphasis added).

Under Title VIII, "private attorneys general," bringing actions under section 812(a) or section 810(d), do provide "the main generating force" in combatting "the enormity of the task of assuring fair housing." But the text of neither section 810 nor section 812 discloses any congressional intent to forbid a corporation, private or public, from bringing an action under either section to "vindicat[e] a policy that Congress considered to be of the highest priority."

Measured by these requirements, articulated in part II, A, defendants' arguments will be considered in light of the complaint and the supplementing discovery record.

In *Bellwood II, supra,* at 109-10, the Court stated that "[t]he gist of Bellwood's complaint is that petitioners' racial steering effectively manipulates the housing market in the described area of the village" and that "this conduct is affecting the village's racial composition, replacing what is presently an integrated neighborhood with a segregated one." The allegations of the present complaint are similar. The first paragraph of the complaint charges the defendants with "racial steering." Paragraph 5 alleges that

> [p]laintiff city seeks to continue to be a well-maintained, stable, integrated community without resegregation in any part thereof for the benefit of its residents and all those that choose to live therein.

At another point, paragraph 5 states that

> [t]o ascertain compliance with federal, state and local fair housing laws, the city has for several years, monitored real estate practices by auditing the defendant broker and its sales agents as well as other real estate firms operating in the city.

Discovery has established that the city contracted with the Heights Community Congress to conduct such an audit in spring of 1978. Paragraph 16 of the complaint alleges that the monitoring of the activities of the defendants revealed

> a pattern and practice of racially discriminatory housing practices by the defendants including locational steering by race, racial remarks, racial disparity and financing, racial differentiation and treatment and racially inconsistent advertising.

In paragraph 14 the complaint alleges that

> [n]otwithstanding the decree [the 1973 decree "requiring specific affirmative fair housing activity"], defendants and their agents engaged in racially discriminatory housing practices which contributed to the erosion, interference and obstruction of integrated housing opportunities by the defendants' failure to abide by their affirmative fair housing duties.

The complaint further alleges in paragraph 24:

> Remaining plaintiffs reside in neighborhoods which they seek to maintain as racially balanced and integrated. As a result of the acts and conduct of the defendants, persons who would otherwise be residing in Cleveland Heights have been steered, induced or otherwise kept away from their respective neighborhoods and accordingly the economic, professional and social benefits have been denied.

In *Bellwood* it was alleged that racial steering of the realty firms affected the village's racial composition "replacing what is presently an integrated neighborhood with a segregated one." Construed most favorably for the plaintiffs, their complaint is deemed to contain allegations substantially similar to the *Bellwood* allegations. The present complaint asserts that "locational steering by race" and other practices of defendant Hilltop and its defendant agents have "contributed to the erosion, interference and obstruction of integrated housing opportunities" in Cleveland Heights.

However, on the basis of discovery, defendants seek to distinguish *Bellwood*'s facts from the facts of the present case. They say that "a particular residential area within Bellwood was the alleged target—not an entire city," while

here "the entire city of Cleveland Heights is the subject of plaintiffs' claims." Defendants then say that

> [a]ll the discovery taken to date shows that the City of Cleveland Heights is an open and integrated community which, in contrast to the target area in Bellwood, is in no way becoming a "predominently Negro" community. *Gladstone, Realtors* v. *Bellwood, supra.* The black population of Cleveland Heights is only 23 percent (answer 13 to Interrogatories Propounded to the City).

Attached to defendants' brief is a November 1979 Cuyahoga Plan Report on population and race estimated by census tracts. Offered to show that the "rate of increase of the black population of the city has slowed in recent years," the report reveals that the population of Cleveland Heights was three percent non-white at the time of the 1970 census. Estimates of non-white population are 8 percent (1973), 19 percent (1976), 21 percent (1977), and 23 percent (1978).[8]

The 23 percent, an average, is deceptive. It conceals substantially higher non-white percentages in certain areas of the city. The Cuyahoga Plan Cleveland Heights census tract estimates for the year 1978 vary from one tract that is seven percent to one that is 48 percent. Four census tracts show non-white percentages of 32, 36, 38, and 39.

The school population racial composition has a wider range. The minority report for January 26, 1979 Cleveland Heights—University Heights City School District discloses minority percentages (rounded numbers) ranging from a low of 19 percent in Roxboro Elementary School to 69 per-

[8] Ms. Barbara Roderick, employed in different housing capacities for Cleveland Heights beginning in 1970, was commissioner of real estate programs when she resigned on November 1, 1979. In her deposition of February 19, 1980, Ms. Roderick testified that the percentage of minorities is "over 25% at this point."

cent in Millikin and 76 percent in Boulevard. These figures show that while Cleveland Heights is an "integrated community" as defense counsel states, there is a genuine issue of fact as to defense counsel's further statement that Cleveland Heights (i.e., some city neighborhoods) "is in no way becoming a 'predominantly Negro' community." Also, the city's "openness," in the sense of an absence of unfair housing real estate practices, is a disputed issue in this case.

Defendant calls attention to testimony of Lana Cowell, executive director of the Heights Community Congress concerning a newspaper story of June 14, 1979. The story referred to a 1978 new homeowner questionnaire ("73 percent of those homeowners surveyed were white and 23 percent were black"). The article quoted Ms. Cowell as saying that this distribution represents stability. She was asked if this was accurate. She answered, "That's what I said." Defendants also refer to a promotional piece of the HCC and a statement that the evolution of Cleveland Heights "from an all-white suburban community to an integrated community, which provides a variety of cultural heritages, has been most unique and successful." Defendants then go on to conclude:

> Given the fact that Cleveland Heights is a well-integrated, stable community, it is difficult to see how the city can be said to have suffered any injury comparable to that alleged by the village in Bellwood.

Defendants' characterization of defendant Cleveland Heights as "a well-integrated, stable community" omits reference to discovery testimony which makes an issue of a stable racial balance in some areas of Cleveland Heights. City Manager Richard V. Robinson was asked if the Cuyahoga Plan estimate of 23 percent blacks was injurious to the city. He answered:

> Do I think, per se, as a piece of statistical information, no. As it relates to housing patterns and locations, yes. Concentrations exist.

Further asked if he thought these concentrations are desirable for the city, he answered, "no," explaining:

> They show an apparent locational steering which was validated through audits, in that people were shown certain areas of the city and not others because there appeared to be no free market choice as to where they could buy homes.
>
> We have not seen this with homes of comparable size and comparable price. We have not seen this type of pattern or residency taken up in other eastern suburbs such as Lyndhurst, South Euclid, which are contiguous.

In related testimony he noted, "There is a psychological effect that has been recognized by the courts called the tipping point." He explained the problem of the heavy concentrations of black population:

> It is a combination of both the reaction of the residents living there and the reaction of individuals that might be looking for housing there. I don't know if you have followed, or the real estate industry has, to look at any statistics of white sales of homes that has occurred in East Cleveland [adjoining Cleveland Heights on the north] within the last few years, but there is a perception that it is an all-black community,[4] and therefore there are not white move-ins into the community.

Ms. Roderick, former commissioner of the city's real estate programs, indicated there are "smaller neighborhoods

[4] The Cuyahoga Plan report estimates the percentage of non-white population in East Cleveland as 82 percent, ranging from a low of 60 percent in one census tract to a high of 100 percent in another census tract with intermediate percentages in the remaining census tracts.

within census tracts that are probably predominantly [more than 50 percent] black." She was then asked whether she was saying that the so-called injury to the city affects more than those neighborhoods. She answered, "Yes, it has an effect on people moving into any part of Cleveland Heights." Explaining, she stated:

> I think white families for the most part are not looking for a community that is already 50 percent black. If they are talking about integration, they are talking about something that for the majority of white families is more comfortable, perhaps 10 or 20 percent, which would again reflect the county percentage of minority families, [while] ours is more integrated than the county average.

The discovery record, here highlighted, shows that despite the integrated character of Cleveland Heights as reflected in the Cuyahoga Plan's November 1979 estimate of the overall population being 23 percent non-white, several census tract areas have considerably higher non-white populations; in at least one, the non-white population is approaching 50 percent. Moreover, several elementary school districts in these sub-areas of the city are now predominently non-white. Quoted testimony tends to show that locational steering by race is pushing these neighborhoods away from integration and towards segregation. Thus as to these target areas, as in *Bellwood*, the plaintiffs allege that defendants' "conduct is affecting the [city's] racial composition, replacing what [are] presently . . . integrated neighborhood[s] with . . . segregated one[s]."

In *Bellwood II*, the Court stated, "A significant reduction in property values directly injures a municipality by diminishing its tax base, thus threatening its ability to bear the cost of local government and to provide services." *Id.*, at

110-11. While no allegation is made in the complaint that real estate tax values have diminished in Cleveland Heights, both Ms. Roderick and Mr. Robinson were interrogated by defendants' counsel on this subject. It is the opinion of Ms. Roderick that illegal real estate practices "and in particular, the alleged actions of Hilltop Realty," have affected the real estate tax base of Cleveland Heights. Asked how she knew that, she answered:

> The steering and other discriminatory acts that lead towards resegregation diminsh the demand for housing.

Ms. Roderick also observed that "in the last assessment, our commercial properties decreased more than those in most other communities." Resegregation, in her mind, was one of the factors in this decrease.

Mr. Robinson was referred to a Cleveland Heights block fund grant application (not an exhibit) which apparently indicates estimated change in Cleveland Heights property values from 1976 to 1979 of 44.7 percent, with only Shaker Heights listed as having a higher increase. Significantly, following the reference to the increases in values, this exchange occurred:

> Now, you contended that the rise in values in Cleveland Heights has not kept up with other surrounding communities, and is it your position that that is due to some actions by realtors or the real estate industry?
>
> A. In part, yes.
>
> Q. How or why:
>
> A. The locational steering and the unfair sales practices and the concentrations of minorities in particular areas as a result of the housing sale process has generated what I consider professionally to be adverse

> effects on the appraised values of homes in Cleveland Heights.

At another point, Mr. Robinson testified that the law department had "recommended" to him "that locational steering had in fact occurred and by Hilltop Realty." Mr. Robinson's testimony is sufficient to attribute to realtors locational steering (a violation of section 3604, see n.1, *supra*) which produced "concentrations of minorities in particular areas," with a resulting "generat[ion]" of "adverse effects on the appraised values of homes in Cleveland Heights." [5]

Therefore, at this stage of the case, the complaint and supplementing evidence, given the most favorable construction, are sufficient to show that locational steering by race, a violation of section 3604, has been committed by defendant Hilltop and its agents and that this has caused, or is likely to cause, economic injury to Cleveland Heights. Standing on the part of Cleveland Heights to bring this action is thus established.

B.

The discovery factual record shows that Cleveland Heights has suffered a further distinct and palpable injury by reason of the practices of the defendants. Asked what is the economic injury that Cleveland Heights has suffered by reason of discriminatory real estate practices of the defendants, Ms. Roderick answered:

> The city has expended significant numbers of dollars in an attempt to overcome or compensate for what we

[5] This last opinion, corroborated by Ms. Roderick's testimony, is probative at this stage of the case although it appears to conflict with the Cleveland Heights property value increase rate asserted in the block grant application. See text at p. 16.

> believe to be illegal real estate practices in terms of dealing with the anxiety that it creates for residents, in having to develop our own program of promotion, and having to spend many years in educating the industry and trying to conciliate with the industry to improve real estate practices. That's one of the economic injuries.[6]

As early as 1973, the city, working separately, but in conjunction with the Heights Community Congress, staffed, and thus expended funds for different programs to achieve and maintain open (fair) housing in the city. First as the Community Relations Office, then in 1974 as the Heights Housing Service, the office had grown to 11 staff members in 1977. It is coordinated under the commissioner for real estate programs. It has sought to assist the real estate industry in being able to continue to attract white families to the community through the promotional advertising of the city.

Escort services of the Housing Service assist sellers, as

[6] Funds used by the city for fair housing programs have come from three sources. These figures show its magnitude. Through 1979 the city spent more than $400,000 on its housing program, an amount representing approximately 10 percent of the Community Development Block Grants it received. The 1978 budget appropriated $40,000 for fair housing, $25,000 for Heights Community Congress, and $115,920 for Real Estate Division, a total of $181,350 coming from the Community Development Block Grants. The Cleveland Foundation gave a grant of $25,650, and $33,545 came from the general fund. Other community development and general fund monies were expended on the Comprehensive Housing Program through the planning and development, financial, and law departments.

The actual proportion of local to federal funds expended for fair housing cannot be determined on the present record. While only general funds would represent monies raised by taxes, the expenditure of any other funds (federal or foundation) entrusted to the city to achieve and maintain open housing and to enforce fair housing laws represents economic injury, for standing purposes. Of course, the city seeks no damages, and thus the question of its right to recover any expended monies need not be considered.

Ms. Roderick explained, "by assuring them that all qualified buyers would have a chance to see their homes that were for sale." To accomplish this, it provides an information and escort service to prospective families, both black and white, "to assure that both black and white families had a chance to see all ten elementary school districts" and to "promote the benefits of living in [the Cleveland Heights] community." For the first two years, this escort service was performed by the Heights Community Congress under contract with the city. In 1976 the function was taken over by the Housing Service.

In April 1976 the Housing Service instituted the preferred agent program, thus described in a printed release of the city's Office of Real Estate Programs (Housing Service):

> As part of a comprehensive real estate program, the city of Cleveland Heights has established a preferred real estate sales agent list [PAL]. This list contains the names of sales agents who have successfully completed an extensive orientation and education program. They have demonstrated through their participation in this program their commitment to promote and maintain Cleveland Heights as an open, integrated, well-maintained residential community. Prospective home buyers and sellers are urged to utilize the services of these professionals to meet their housing needs.

Both in 1976 and in 1977 Heights Community Congress conducted audits for Cleveland Heights and compared the performance of PAL agents with non-PAL agents. As Ms. Roderick explained it, the purpose of these audits (paid for by Cleveland Heights) was to determine how well the orientation program did in educating the preferred agents and to see whether they were "doing better than non-preferred

agents in terms of the Fair Housing Law and in terms of their attitudes about Cleveland Heights."

From April 4 to April 17, 1978 Heights Community Congress and a consultant, pursuant to a Cleveland Heights contract, conducted a study (audit) "of the availability of housing within the community and other aspects of the housing delivery system within the community." Pursuant to the contract, the 1978 spring audit was designed as a replica of the HUD/NCDH [7] nationwide audit conducted in 1977, except that the audit involved only sales, no rentals; the time span was longer; and the sampling procedure was done locally instead of in Washington. The contract provided that the Heights Community Congress should be paid a sum not to exceed $9,500, and substantially that amount was paid by the city for the audit. Thirty-five different real estate firms were audited. Noting that the audit was a change in format from what had been done before, Ms. Roderick stated that "the intent of this survey was to understand real estate practices . . . the reason for doing the survey was not litigation." [8]

Under these circumstances and upon the entire discovery factual record, it is concluded that the monies expended by the city in conducting programs to achieve and maintain open (fair) housing and deemed essential to its survival, represent economic injury to the city. Treated separately from the economic injury considered in III A, it satisfies the Article III requirement that "the plaintiff must show that he personally had suffered some actual or threatened

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[7] National Committee against Discrimination in Housing (hereafter HUD audit).

[8] Another function of the housing office is related to the city's commercial properties. Ms. Roderick stated that "the city has had to make special efforts and assign specific staff people to work in that whole area of commercial reinvestment."

injury as a result of the putatively illegal conduct of the defendant." *Bellwood II, supra,* at 99.

IV.

A.

The standing of each of the individual plaintiffs will be judged by the court's decision on standing in *Bellwood II,* at parts IV and V. Of the six individual plaintiffs in *Bellwood II* (respondents in the Supreme Court), four white persons actually were "homeowners in the community against which petitioners alleged steering [had] been directed." They claimed that "the transformation of their neighborhood from an integrated to a predominantly Negro community [was] depriving them of the 'social and professional benefits of living in an integrated society'." *Bellwood II, supra,* at 111. Finding indistinguishable the Court's decision in *Trafficante,* in which a similar allegation was held to state a distinct and palpable injury, the Court declared:

> [F]or the purpose of standing analysis, we perceive no categorical distinction between injury from racial steering suffered by occupants of a large apartment complex and that imposed upon residents of a relatively compact neighborhood such as Bellwood [a 12 x 13 block area in a municipality of 20,000].

Id., at 114. As to the four individual respondents who lived in the target area, the Court found that "the facts alleged in the complaints and revealed by initial discovery [were] sufficient to provide standing under Article III." *Id.,* at 115.

On the record before it, the Court sustained summary judgment as to Perry, a black who lived in Bellwood but outside the "target neighborhood of Bellwood" and Sharp, a black who lived in Maywood. The Court further stated:

> Although we intimate no view as to whether persons residing outside of the target neighborhood have standing to sue under section 812 of Title VIII, we do not foreclose consideration of this question if, on remand, the District Court permits respondents Perry and Sharp to amend their complaints to include allegations of actual harm.

Id., at 113 n.25.

The Court's open-ended remand gave tentative effect to the summary judgment ruling. However, it seems unlikely that summary judgment as to Perry would have been sustained if the Court believed that actual harm attached to Perry because of his residence in Bellwood, derived vicariously from the harm allegedly "done to the residents of the carefully described neighborhood in Bellwood in which four of the individual respondents reside[d]." Thus, residence in Bellwood, without residence in the target neighborhood, was not enough to create a claim of deprivation of the "social and professional benefits of living in an integrated society."

In passing on the standing of each of the individual plaintiffs, the critical factor, therefore, will be whether the plaintiff is living in a neighborhood that is becoming a "predominantly Negro community." The absence of residence in such a community will deny the particular plaintiff the right to claim "the loss of social and professional benefits." Consideration would then be given to any claim of economic injury as a resident of Cleveland Heights, such as "relative diminution in value of the [plaintiff's] home." *Bellwood II, supra,* at 115.

B.

Sandra McGee and her husband and daughter moved to Cleveland Heights from Brookpark, Ohio. He was working

in the Ford Motor plant in Brookpark. They made the move because they thought

> [Cleveland Heights] offered a diverse and stable community, integrated you know, where there were blacks living in the community, and you know, there were whites and offered a diversification. We certainly weren't getting that in Brookpark.

The McGee's purchased a home on Berkeley in 1970. She says there are approximately 83 homes on Berkeley. Four were black at the time she moved in. She believes now that, conservatively, 73 of the 83 homes are black. Asked if she knew any of the white families that had moved out of the neighborhood, she said that she did. She knew them personally and very well. She knew some (six) socially. They were involved in a neighborhood association. White families have moved farther east "around Punderson, Chagrin Falls, that area, Hudson."

Asked if she had any objection to the apparent increase in the minority population, she answered:

> Yes, I feel that it has deprived me of some social, interracial associations and some economic benefits, and certainly some professional services.

Applying the standards on standing set forth in part III A, Sandra McGee's described losses of social and professional benefits through the transformation of her street depicts a distinct and palpable injury. She has standing to claim, as the testimony of witnesses Roderick and Robinson generally indicates, that racial steering contributed to by acts of the defendants has played a part in changing the composition of her neighborhood from integrated to predominantly black.

Any class that Sandra McGee might properly represent would not be city-wide as she seeks. At most, the class would be limited to those black citizens of Cleveland Heights that live in any area that is losing its integrated character and is becoming a predominantly black neighborhood. Howevere, [sic] any decision regarding class certification must await a hearing directed at such issue.

C.

Kenny Peterson and his wife Mary Jude purchased a home on Cummings Road in Cleveland Heights in 1977. Mr. Peterson states that his neighborhood (Cummings Road) has not changed appreciably since they moved in. It basically has the same number of blacks that it had in 1977. He has continued social relationships with blacks in his neighborhood. Residents in an apparently stable, integrated neighborhood, he and his wife could not and do not claim a loss of social benefits from interracial relationships. Thus he does not show the actual injury as defined by the *Bellwood* criteria of standing, part III A.

Mr. Peterson is concerned about the "disruptive effects that steering and racial isolation have caused within the community." When asked to indicate how the acts of Hilltop had affected him in the neighborhood of the Taylor Road school district, he answered:

> They have affected me in my neighborhood in as far as being a member of the neighborhood also makes me a member of Cleveland Heights and they have affected Cleveland Heights as a whole and therefore affected me and my neighborhood.

Since Mr. Peterson's own statements show that he has not lost the social benefits of interracial living in his own neighborhood, he is thereby insulated from claiming that

type of injury in some other neighborhood of Cleveland Heights. Thus, he cannot vicariously claim injury to another neighborhood by reason of his residence in Cleveland Heights. This constitutes no actual injury under section 812 and section 804 judged by the *Bellwood* criteria of standing.

On the same record, Mary Jude Peterson lacks standing. Her additional claim is that she has been deprived of social benefits of interracial association "as a member of the white class" but not personally. This is not sufficient to establish standing, *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 40, n.20 (1976); *Warth* v. *Seldin,* 422 U.S. 490, 502 (1975).

Nor do the Petersons describe any economic injury which they are entitled to assert. Any expense in operating the Housing Service, as found, represents economic injury to the city. But derivatively, no taxpayer may assert such an economic injury.

Therefore, it is concluded that both Mr. and Mrs. Peterson lack standing to seek damages individually and as a representative of a white class of citizens of Cleveland Heights.

D.

Raymond Charles Hendricks and his wife reside on Tremont Road off Noble Road. They purchased the home in 1972. Mr. Hendricks believes that he has seen a figure of five percent minority population for "the general area." The approximate percentage of blacks in his census tract is 15 to 20 percent. Of the 11 homes on his street, three families are black and one is biracial. They have lived on the street four or five years. The change in racial composition of the neighborhood has not yet been enough to make the street predominantly Negro. Thus the condition that upheld

standing in *Bellwood*, with any resulting loss of social and professional benefits of interracial association, is not present.

Describing the injury which he felt he suffered from what he regarded as an act of racial steering, he stated:

> If that type of activity continues, I no longer live in a community which is open and integrated to people who, from their free choice, want to live here. Someone else is choosing the people who want to live in Cleveland Heights by showing them different locations.
>
> Q. And how does that injure you?
>
> A. It injures me because I've bought a home in a community that's open and integrated, and that's the way I wanted to buy a home and that's the kind of a community I want to continue to live in.

Under *Bellwood*, indirect victims entitled to claim actual injury under section 3612 would be those suffering loss of social and professional interracial benefits in any Bellwood-type target area of Cleveland Heights. The statute as written and construed, may not be stretched to grant standing to the class of indirect suitors who would base their claims solely on their residency in a city manipulated by racial steering or on any resulting shattering of a personal perception of continued life in a "community that's open and integrated."

Mr. Hendricks also speaks of injury "because of manipulation generally affecting my community, causing the community to spend hundreds of thousands of dollars in real estate programs, basically to combat manipulation." Thus he properly puts this in terms of cost to the city. He does not show how he personally has suffered economic injury or loss.

Hence it is concluded that on the undisputed record, Mr. Hendricks lacks standing to seek damages either individually or as a representative of a white class of citizens of Cleveland Heights.

E.

Lonnie Newsom, his wife and children resided at 2900 Edgehill Road, Cleveland Heights from 1972 until 1979 when they moved to Worthington, Ohio. In his block of Edgehill Road, there was one other black family. That same black family was there when he moved. The black population of the Coventry school district in which the Newsoms lived was estimated at about 17 percent.

Mr. Newsom was active in Coventry Neighbors and The Committee to Improve Community Relations, both groups that are connected with the Heights Community Congress. When asked about his injury, he answered:

> Economically, I would like to live in a place where I don't have to invest large amounts of my time trying to monitor real estate agencies, large amounts of my time being involved in community relations activities at the schools, large amounts of my time and money not being devoted to, you know, trying to reintegrate the school system.

Voluntary expenditures of time and energy, even personal funds, to advance these causes, however worthy, "constitutes an abstract injury, not judicially cognizable in the assessment of plaintiff's standing." *Mulqueeny* v. *National Commission on the Observance of International Women's Year, 1975,* 549 F.2d 1115, 1121 (7th Cir. 1977).

Upon the undisputed record and the principles previously stated in part IV A, B, C, and D, it is concluded that Mr. Newsom lacks standing to seek damages. No longer a resi-

dent of Cleveland Heights, he could not properly or adequately represent any class of black citizens of Cleveland Heights.

F.

Plaintiff Sara Louisa Taylor, her husband Philip and her two children have lived at 2894 Meadowbrook Road, Cleveland Heights, since 1969. Mrs. Taylor's testimony does not indicate the racial composition of her neighborhood. However, she resides in census tract 1414, which had an estimated eight percent non-white population in 1977 and an estimated 14 percent non-white population in 1978.

Applying the principles set forth in part IV A, B, C, D, and E, it is concluded on the undisputed record that plaintiff Taylor lacks standing to seek damages both individually or as a representative of a white class of citizens of Cleveland Heights.

V.

Defendants finally challenge the standing of plaintiff Heights Community Congress, a not-for-profit Ohio corporation. In the complaint it is alleged that HCC "has as its primary objective to promote and to maintain Cleveland Heights as an open and integrated community." It is further alleged in part:

> Plaintiff HCC has over 200 component organizations representing over 58,000 residents of Cleveland Heights and has undertaken specific activities to achieve, promote and maintain its community as balanced and integrated including the monitoring of real estate practices of the defendant and of other real estate firms, providing technical guidance to the defendant and other real estate firms, educating the community at large, the defendant and other real estate firms about fair housing,

> working with local government to provide inducements to real estate firms including the defendant to practice fair housing and engage in a comprehensive effort to maintain balanced and integrated housing and educational opportunities.

Asked in interrogatory No. 12A to state any injuries it suffered, HCC answered that it has expended funds for the purpose of promoting and maintaining an open and integrated community. Defendants argue that this statement fails to show any concrete injury to HCC of the type required to provide standing under Article III. Defendants cite *Bellwood I*, in which the Seventh Circuit Court of Appeals affirmed the dismissal of plaintiff Leadership Council for Metropolitan Open Communities. In part, the court there stated:

> The sole allegations are that racial steering interferes with the Council's mission and costs it funds to attack. But the Council's interest in open housing matters and its asserted commitment to effectuating that interest, albeit commendable, do not substitute for the concrete injury constitutionally required to invoke the jurisdiction of the federal courts. *See Simon, supra,* 426 U.S. at 39-40, 96 S.Ct. 1917; *Warth, supra,* 422 U.S. at 511-17, 95 S.Ct. 2197; *Sierra Club* v. *Morton,* 405 U.S. 727, 739-40, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *Mulqueeny* v. *National Commission on the Observance of International Women's Year, 1975,* 549 F.2d 1115, 1120-22 (7th Cir. 1977). The alleged dollar cost to the Council of attacking defendants' alleged practices is simply "concomitant to [its] keen concern" about open housing issues, and does not present independently cognizable injury.

Id., at 1121.

The Leadership Council is "involved in various fair

housing activities through [sic] the greater Chicago area and elsewhere" (affidavit of Executive Director Kale Williams). In contrast, it is alleged, and the record shows, that the HCC has the primary objective of promoting and maintaining *Cleveland Heights* "as an open and integrated community." This geographical difference does not distinguish the authority of *Bellwood* I and its quoted language. But the record here requires a different result because of the relationship between the City of Cleveland Heights and the Heights Community Congress in seeking to make and maintain the city "open and integrated" and the nexus between their joint efforts and the activities of the defendants that are the subject of this action.

The HCC has nine classes of membership, the first of which, governmental, includes a member appointed by the City Manager of Cleveland Heights. The other classes are community-wide, *e.g.*, school board, library, religious groupings, business, and merchants. In addition, neighborhood organizations are members of the HCC. While the HCC works in every area of community life, the record has emphasized its fair housing programs.

Two major programs of the HCC, conducted through its volunteers, have been the periodic New Homebuyer Questionnaire and various audits of realty companies and agents. Data collected in the questionnaires include race of buyers; community origin of buyer; stated preference, if any, of integrated area; stated preference, if any, of Cleveland Heights, etc. By September 1977 the HCC had conducted five audits of fair housing practices in Cleveland Heights. The 1977 audit began in April and continued through December.

A portent of things to come was articulated in a February 1978 letter of the HCC Open Housing Task Force to each participating checker summarizing the April-Decem-

ber 1977 audit. After noting that "this important monitoring tool was made possible with a substantial effort of many black and white volunteers," the Task Force itemized results of the audit. The letter then stated:

> Steering, the collective effect of [the itemized] practices, has been hard on this community. Some neighborhoods are showing trends toward resegregation, while communities to the east remain all white.

In April 1978 HCC performed for Cleveland Heights a replica of the nationwide HUD 1977 audit. This was the largest of the audits yet performed in Cleveland Heights. The June report of the consultant, Dr. Julie Saltman, concluded in part,

> It is apparent from the results of this 1978 Audit that racial discrimination in housing is a pervasive and crucial problem in the Cleveland Heights area.

It is clear that the results of the spring 1978 audit, perhaps supplemented by the HCC's fall audit of four companies, led to the decision of HCC and eventually the city to bring this action. Informative as to the state of integration in Cleveland Heights two months before the suit was filed is the following quotation from the memorandum of January 9, 1979 from Gay Quereau to the Open Housing Task Force as to its future direction. Item 3 began:

> Consider undertaking a formal six-month study on affirmative marketing (a program to encourage whites to buy in Cleveland Heights and other integrated areas while encouraging blacks to consider non-integrated areas).

This review of the record helps to understand HCC's assertion of an economic injury. It does show that despite

the expenditure of funds (largely HCC staff salaries) in initiating and carrying on the fair housing programs, unfair housing practices have persisted. The 1977 audit reported, "Steering . . . has been hard on this community. Some neighborhoods are showing trends toward resegregation." The spring 1978 large scale audit revealed that "racial discrimination in housing is a pervasive and crucial problem in the Cleveland Heights area."

Given other evidence that tends to connect the locational steering, at least in part to the defendants, the actual injury caused to plaintiff HCC by locational steering by race is interference with and frustration of its fair housing programs. That injury is made concrete and quantified by the funds expended by HCC in carrying out those programs.[9] HCC's expenditure of funds is more than "concomitant to [the] keen concern," *Mulqueeny v. National Commission on the Observance of International Women's Year, 1975, supra,* at 1121, of the staff, members, and supporters of the goals of HCC. The funds expended by the HCC represent a direct injury to the organization itself.

The words of *Coles v. Havens Realty Corp.*, No. 78-422 (4th Cir. Sept. 18, 1980), are particularly applicable:

> Although HOME's goals cannot be equated with bricks and mortar, they are functional, requiring identifiable action and the expenditure of effort and funds which may result in success or failure in achieving its objectives. Its "projects" therefore "provides that 'essential dimension of specificity' that informs judical decision making," as described in *Arlington Heights,* [*Vil-*

[9] Lana Cowles similarly defined HCC's economic injury:

A. The injury is the injury that is incurred by virtue of the fact that the Heights Community Congress, the goal of the Heights Community Congress has been interfered with. The Heights Community Congress continues to expend money for programs to counteract the effects of discriminatory real estate practices.

lage of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977)].

This court declines to follow *Bellwood I*, as quoted at p. 30, *supra*. Instead, accepting *Coles*, this court finds that HCC has organizational standing. HCC may press a monetary claim to the extent of funds expended as a result of defendants' practices, and it may also join the city in its request for injunctive relief. However, insofar as HCC seeks to represent its members in bringing any monetary claims, the request is denied.

VI.

In the nature of a postscript, it should be understood that no factual issues have been resolved on the merits by any reference in the opinion to the factual record developed on discovery. Final resolution of the factual and legal claims of the plaintiffs who remain in the lawsuit must await trial on the merits.

What is now resolved is the multi-branched defendants' motion for summary judgment on the issue of standing. The motion is denied as to the city of Cleveland Heights, Heights Community Congress, and individual plaintiff Sandra McGee. The motion is granted as to individual plaintiffs Kenny and Mary Jude Peterson, Raymond Charles Hendricks, Lonnie Newsom, and Sara Louisa Taylor.

IT IS SO ORDERED.

WILLIAM K. THOMAS
U. S. District Judge

Office-Supreme Court, U.S.
FILED
MAY 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-988

In The

Supreme Court of the United States

October Term, 1980

HAVENS REALTY CORPORATION and
ROSE JONES,

Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 16, 1980
CERTIORARI GRANTED APRIL 20, 1981

JOINT APPENDIX

Table of Contents

Page

Docket Entries ..... App. 2

Complaint in the District Court ..... App. 11

Defendants' Pleadings in Response to Complaint in the District Court ..... App. 21

A. Motions to Dismiss ..... App. 21

B. Answer ..... App. 26

C. Defendants' Brief in Support of Motions to Dismiss ..... App. 29

Order of Dismissal in the District Court ..... App. 32

Memorandum Opinion in the District Court ..... App. 33

Motion to Reconsider in the District Court ..... App. 36

Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss ..... App. 38

Order Denying Motion to Reconsider in the District Court ..... App. 55

Motion for Entry of Final Judgment in the District Court . App. 56

Order for Final Judgment in the District Court ..... App. 59

Notice of Appeal ..... App. 61

Opinion of the Fourth Circuit Court of Appeals ..... App. 63

DOCKET ENTRIES

1979

Jan. 9—Complaint filed. No Jury Demanded.
Jan. 10—Summons Issued.
Jan. 31—Defts' Pleadings in Response to Complaint (Motions to Dismiss and Answer—1 pleading)
Jan. 31—Defts' Brief in Support of Motions to Dismiss, filed
Feb. 2—Notice to take depositions of pltfs 2-23-79 filed by dfts.
Feb. 16—ORDER, in accordance with memorandum filed herewith, claims of Pltfs. Coleman and Willis, and Housing Opportunities Made Equal are dismissed, and further Defts' motion to dismiss is hereby denied, DDW, ENT. 2/16/79, filed.
Feb. 16—Memorandum of the Court, filed.
Feb. 20—Pltfs' Memorandum of Law in Opposition to Defts' Motion to Dismiss, rec'd.
Feb. 16*—Pltf's Motion to Reconsider, filed.
Feb. 22—ORDER, motion of Pltfs. Coleman, Willis and Housing Opportunities Made Equal to reconsider, on 2/16/79 is DENIED and brief tendered on 2/20/79 marked filed by the Clerk will not be considered, ENT. 2/22/79, DDW. Copies mailed.
Mar. 5—Pltfs', Coleman, Willis & H.O.M.E., Motion for Entry of Final Judgment, filed.
Mar. 7—ORDER of FINAL JUDGMENT as to claims of pltfs. Coleman, Willis & Housing Made Equal vs. defts ent 3-6-79, DDW, filed 3-7-79. Copies to counsel.
Mar. 8—IPTO, non-jury, ent'd, 3/8/79, DDW, filed.
ing, fees paid, filed.
Mar. 15—Pltfs' Notice of Appeal, Appeal Bond Undertak-

Mar. 20--Record on appeal as to dismissed plaintiffs, 1 vol, del'd to Clerk, U.S.C.A.

Apr. 2—Pltfs' 1st Request for Production of Documents to Deft Havens Realty Corp., filed.

Apr. 2—Pltfs' 1st Interrogatoires [sic] to Deft Havens Realty, filed

Apr. 4—Deposition of Paul Allen Coles, taken on February 29, 1979, et al, on beahlf [sic] of Pltf's, Rec'd.

Apr. 9—Pltf's 2nd Request for Production of Documents to Deft Havens Realty Corporation, filed

May 4—Pltf's Notice to take the Depositions of Arthur E. Havens, on March 12, 1979, et al, filed.

May 4—ORDER, that deft., Havens Realty Corp., may have through 5/9/79 to file its responses to Pltfs' First Request for Production of Documents & Pltfs' First Interrogatories. Ent. by DDW on 5/4/79 & filed. Copies mailed.

May 9—Deft, Havens Realty's Answers to Interrogatories, filed.

May 9—Deft, Havens Realty's Objections to Interrogatories, filed.

May 23—Deposition of Rose Jones, et al, taken on May 12, 1979, by pltfs., Rec'd.

May 30—Pltf's Motion for Order changing the deadline for filing of motion for class certification to May 31, 1979, filed.

May 30—ORDERED that the Initial Pre-Trial Order in this case be amended as follows: Pltfs shall file Motion for Class Certification on or before March 31, 1979, and Defts shall file response no later than 10 days after the filing of Motion. ENT 5-30-79, DDW, and filed. Copies mailed.

May 31—Pltf's Motion for Certification as a Class Action, filed

May 31—Pltf's Memo. of Points and Authorities in Support of Pltf's Motion for Certification as a Class Action, filed.

May 31—Affidavit of Dr. Lynn D. Nelson, filed

June 11—Motion for dismissal of class action with supporting brief filed by dfts.

June 18—Pltfs' Rebuttal to dfts opposition to class cert. filed.

Aug. 15—Pltfs' Memorandum of Points & Authorities In Support of Certification of Pltf. Classes & In Opposition to Certification of A Deft. Class, filed.

Sept. 26—ORDER that deft class not be certified; class discovery to be reopened with the exception of young [sic] v. Rucker & Richardson 79-0071 to all pltfs an additional 45 days for class discovery relating to numerosity requirement; pltfs to submit adequate proofs of numerosity in 60 days or motions for certification will be denied; defts to respond to pltfs' proofs in 10 days, ent. 9-26-79, DDW, filed. Copies mailed.

Sept. 26—ORDER that cases 78-1071-R, 79-0024-R, 79-0070-R, 79-0071-R, 79-0072-R, 79-0111-R, and 79-0112-R be consolidated for trial and be continued to June 23, 1980 at 10:00 a.m., to be completed on or before June 26, 1980; discovery is continued to May 1, 1980; and FPTC is set for June 18, 1980 at 10:00 a.m., ent 9/26/79, DDW, filed. Copies mailed.

Oct. 3—Deposition of Barbara Wurtzel taken on Sept. 19, 1979 at 4:15 p.m., rec'd.

Nov. 13—Pltf's Second Interrogatories to Deft. Havens Realty Corp., filed.

Nov. 26—Pltfs' Memorandum on Numerosity in Response to Court's Order of 9/26/79, filed.

Dec. 6—Defts' Motion for Denial of Pltf's Class Certification Motion, filed.

Dec. 6—Defts' Memorandum of Argument, filed.

Dec. 12—Deft. Havens Realty Corp's Answers to Pltf's Second Interrogatories, filed.

Dec. 14—Pltf's response to defts' motion for denial of pltf's class cert. motion filed.

Dec. 28—Pltf, Home's, motion for remand frm 4th Cir. and to vacate jdgmnt ent. 3-6-79 filed.

Dec. 28—Pltf's brief in support of Home's motion to set aside and vacate final judgment filed.

Dec. 31—Request to Court of Appeal for remand ent 12-31-79, DDW, filed. Cps to counsel and Ct. of Appeals.

1980

Feb. 13—ORDER certifying class and subclass; pltf. Paul Allen Coles to act as representative for both; parties to confer toward goal of proposing a notice of procedure for Court approval in 15 days, ent 2/13/80, DDW, filed. Cps. mailed.

Feb. 13—Memorandum of Court, filed.

Feb. 27—Pltfs' Motion for extension of time to file Notice of Procedure to March 13, 1980, filed. Copies mailed.

Feb. 28—ORDER that Parties directed to tender their proposals of procedure to Court no later than 3-4-80, ent. 2-28-80, DDW, filed. Copies mailed.

Mar. 11—Defts' Response to Court's Order Dated 13 Feb. 1980, filed

Mar. 11—Pltf's Response to Court's Order Dated Feb. 13, 1980, with exhibits, filed.

Mar. 14—NOTICE OF PENDENCY OF CLASS ACTION ent 3/14/80, DDW, filed. Copies mailed.

Mar. 14—ORDERED that notice shall be published once a week for 4 weeks in *Afro-American;* DIRECTED that counsel confer for purposes of notice procedure; defts. shall furnish plts. addresses of tenants managed by defts.; pltfs. shall mail copy of notice to tenants; pltfs. shall in 5 das. of completion file with Court a certificate that directive for dissemination of notice has been followed and order of publication has been completed; ent 3/14/80, DDW, filed. Copies mailed.

Apr. 1—Defts' Interrogatories to Pltf., filed.

Apr. 17—Pltf's motion for clarification of order of 3-14-80 filed.

Apr. 17—Pltf's Memorandum in support of motion for clarification filed.

Apr. 18—Defts' Response to Pltf's "Motion for Clarification of Order of March 14, 1980", filed.

Apr. 30—Pltfs' Certificate of Compliance with Court Order of 3-14-80, filed

May 1—Pltf's Answers to Defts' Interrogatories, filed.

May 19—Pltf's Supp. Answer to Interrogatories, filed

June 9—Pltfs' Proposed Findings of Fact and Conclusions of Law, filed

June 13—Pltf's Supplemental Answers to Interrogatories, filed.

June 18—F.P.T.O. ent. 6/18/80, DDW, filed.

June 19—Defts' Proposal Concerning Proposed Findings of Fact, filed

June 19—Defts' Proposals Concerning Proposed Conclusions of Law, filed.

June 23—TRIAL PROCEEDINGS: WARRINER, J., GAMBLIN, OCR. APPEARANCES: PARTIES W/ COUNSEL. MATTER CAME ON FOR TRIAL ON MERITS. WITNESS EXCLUDED. COUNSEL HEARD

IN ARGUMENT AS TO ADMISSIBILITY OF CERTAIN PLTF EXHIBITS. COURT WILL ADMIT PLTF EXHIBITS 18-41 and 166. OPENING STATEMENTS MADE. PLTF ADDUCED EVIDENCE; RESTED. DEFTS' MOTION TO DE-CERTIFY THE CLASS HEARD; DENIED. DEFTS' MOTION TO STRIKE THE PLTF'S EVIDENCE HEARD; DENIED. DEFTS' MOTION FOR DIRECTED VERDICT HEARD; DENIED. DEFTS' EVIDENCE BEGUN. TRIAL ADJOURNED FOR THE DAY; TO RESUME AT 10:00 A.M. ON 6/23/80. (6 HRS., 01 MINS)

June 23—TRIAL PROCEEDINGS: SECOND DAY. WARRINER, J., GAMBLIN, OCR. APPEARANCES: PARTIES W/COUNSEL. DEFT ADDUCED EVIDENCE; RESTED. EVIDENCE CONCLUDED. ARGUMENT OF COUNSEL HEARD. FINDINGS OF FACTS AND CONCLUSIONS OF LAW GIVEN FROM THE BENCH. COURT FOUND IN FAVOR OF THE PLTF BUT RESERVED JUDGMENT ON MATTER OF DAMAGES PENDING ANY CLASS MEMBERS APPEARANCE. THE COURT FOUND DEFT JONES NOT LIABLE IN CASE OF PLTF COLES AND LIABLE AS TO CLASS MEMBERS. COUNSEL MAY FILE BRIEFS ON DAMAGE QUESTION, ATTORNEY'S FEES, AND LIABILITY TO OTHER CLASS MEMBERS. (1 HR., 52 MINS.)

July 2—Joint motion to establish memoranda schedule filed.

July 2—ORDER, that plft. shall file with the Court his post trial memorandum on the issues of damages, equitable relief & attorneys' fees on or before 7/30/80; defts' shall file their response within 7 days after service upon the defts' of pltfs' memorandum pltf. to file rebuttal 7 days

thereafter after service etc. Ent. by DDW on 7/2/80 & filed. Copies mailed.

July 14—Findings of Fact before DDW on June 23, 1980 (transcript), filed.

July 14—Transcript of Proceedings on May 24, 1980 before DDW, filed.

July 31—Pltf's post-trial memorandum, with exhibits, filed.

Aug. 6—Defts' Reply Memo., filed

Aug. 11—Excerpt from Proceedings before DDW on 6-23-80 and 6-24-80, filed

Aug. 13—Pltf's Post-Trial Memo. in Response to Defts' Reply Memorandum, filed.

Aug. 22—ORDER, that judgment will be entered in favor of pltf., Mr. Coles, against deft., Havens Realty Corp. for compensatory damages in the amount of $1,250 and for punitive damages in the amount of $1,000. Pltf's counsel to file with the Court circulation figures of Richmond Times Dispatch etc. Pltfs' counsel to file an affidavit regarding time records etc. Any class member desiring monetary damages shall file an affidavit within 30 days after completion of publication of newspaper advertisement etc. Counter-Affidavits shall be filed 30 days after the end of period for filing affidavits by class pltfs. Rebuttal affidavits to be filed 15 days etc. All claims not resolved by counsel shall be submitted to the Court. Ent. by DDW on 8/22/80 & filed. Copies mailed.

Aug. 25—Judgment etn. by Clerk 8-25-80, filed. Copies mailed.

Sept. 22—Per Curiam Opinion of U.S.C.A. reversing and remanding decision of U.S.D.C., filed.

Sept. 24—Deft's, Havens Realty Corporation, Notice of Appeal, filed ($70 fees pd.)

Oct. 24—Pltf's Response to Court Order of Aug, 22, 1980, filed.

Oct. 24—Second Affidavit of Daniel M. Singer, filed.

Oct. 24—Second Affidavit of James F. Stutts, filed, with exhibits A-C in brown expandable.

Oct. 27—Per Curiam Opinion of U.S.C.A., reversing and remanding the decision of U.S.D.C.

Oct. 27—Certified Copy of Judgment of U.S.C.A. reversing and remanding the decision of U.S.D.C.

Oct. 27—Case file in I Vol. Rec'd from Clerk U.S.C.A.

Nov. 3—Transcript of Proceedings before DDW on June 23, 1980, filed.

Nov. 3—Transcript of Proceedings before DDW on June 23 and 24, 1980, filed.

Nov. 3—Deft Havens Realty's Motion for Retention of Record in the District Court, filed

Nov. 4—ORDERED that the entire record in action shall be retained in this Court. Clerk shall transmit a copy of Order and docket entries to Court of Appeals. ENT 11-4-80, DDW, and filed. Copies mailed.

Dec. 2—Parties' Joint Motion to Stay Further Proceedings, filed

Dec. 2—Parties' Joint Motion to Approve Proposed Consent Order and to Notice the Class, filed

Dec. 3—ORDER, that further proceedings herein concerning the claims asserted by HOME, Coleman & Willis are stayed pending further Order of this Court. Ent. by DDW on 12/3/80 & filed. Copies mailed.

1981

Jan. 8—Revised Claim Form, received.

Jan. 8—Revised pages 6, 7, and 8 to Consent Order, received.

Feb. 3—ORDER, that a hearing shall be held before Hon. DDW on 2/17/81 at 1:00 p.m. re: proposed settlement etc. Notice of Hearing to be published etc. Claims to be submitted to Clerk no later than 4/18/81. Ent. by DDW on 4/18/81 & filed. Copies mailed.

Feb. 3—Notice Of Hearing On Proposed Consent Order Ent. By DDW on 2/3/81, filed. Copies mailed.

Feb. 17—CONSENT ORDER, (matter referred to Magistrate), ent. 2-17-81, DDW, filed. Copies mailed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, SYLVIA COLEMAN,
R. KENT WILLIS,
and on behalf of all others similarly situated, and
HOUSING OPPORTUNITIES MADE EQUAL,
a Virginia Corporation,

Plaintiffs,

v.

HAVENS REALTY CORPORATION,
a Virginia Corporation, and
ROSE JONES,

Defendants.

Civil Action No. 79-0024
Filed Jan. 9, 1979
Clerk, U. S. Dist. Court
Richmond, Va.

COMPLAINT

(For Declaratory Judgment, Damages and Injunctive Relief)

1. This is an action for a declaratory judgment, damages and injunctive relief to redress the deprivation of rights, privileges and immunities of the plaintiffs, and all other members of the class they represent, from the acts, patterns, practices and policies of the defendants that restrain, limit, classify, segregate and otherwise discriminate on the basis of race or color, in the rental of residential housing units in Henrico County, Virginia. This action involves the pattern and practices of defendants of denying housing on the basis of race and of racial steering, a practice by which

real estate brokers and agents preserve and encourage patterns of racial segregation in available housing by steering members of racial and ethnic groups to buildings occupied primarily by members of such racial and ethnic groups and away from buildings and neighborhoods inhabited primarily by members of other races or groups, a practice in violation of the statutes set forth herein. This action arises under 42 U.S.C. § 3601 and § 3604 (the Fair Housing Act of 1968), and 42 U.S.C. § 1982 (the Civil Rights Act of 1866). This Court has jurisdiction of this action under 42 U.S.C. § 3612(a), 28 U.S.C. §§ 1331, 1337, 1343(4) and 2201.

2. The individual plaintiffs are members of a class composed of all persons who have rented or sought to rent residential property in Henrico County, Virginia, and who have been, or continue to be, adversely affected by the acts, policies and practices of defendants complained of herein.

3. The number of persons in the class represented by the individual plaintiffs ("plaintiff class") is so numerous that joinder of all members is impracticable.

4. There are questions of law and fact common to the plaintiff class. These questions include, among others, whether or not the practices engaged in by defendants in Henrico County deprive the members of the plaintiff class of civil rights secured to them by the Fair Housing Act of 1968 and the Civil Rights Act of 1866. The method by which the defendants violate these statutes and engage in the practice of racial steering is one of the questions of fact common to the plaintiff class.

5. The claims of the representative plaintiffs are typical of the claims of the plaintiff class. The representative plaintiffs will fairly and adequately protect the interests of the plaintiff class because their interests and those of the plaintiff class are coextensive. Counsel for the representative

plaintiffs are capable of conducting the litigation commenced by the filing of this complaint.

6. Defendants have acted or refused to act on grounds generally applicable to the plaintiff class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the plaintiff class as a whole.

7. The individual plaintiffs to this action are all residents of the City of Richmond or Henrico County and have been injured by the discriminatory acts of the defendants. Plaintiff Paul Allen Coles is a black man who has attempted to rent residential property from the defendants ("renter plaintiff"). The remaining individually-named plaintiffs, Sylvia Coleman, a black woman, and R. Kent Willis, a white man ("tester plaintiffs"), have consulted defendants with regard to available rentals in the course of their employment with Housing Opportunities Made Equal to determine whether or not defendants have practiced racial steering in the rental housing market.

8. Housing Opportunities Made Equal ("HOME") is a nonprofit corporation organized under the laws of the State of Virginia with its principal place of business at 503 East Main Street, Richmond, Virginia, 23219. Its purpose is to make equal opportunity in housing a reality in the Richmond Metropolitan Area. Its membership is multi-racial and includes approximately 600 individuals. Its goals include the elimination of unlawful racially discriminatory housing practices that cause injury to its members, to all persons who seek to rent apartment units in the Metropolitan Area and to all persons who reside in the Metropolitan Area. HOME seeks to assure to all such persons the right to the important social, professional, business, economic and political benefits of interracial associations that arise from living in integrated communities. The activities in

which HOME engages include, but are not limited to, the following:

(a) Seeking to assist and aid individuals of all races in obtaining housing throughout the Richmond Metropolitan Area, through the operation of a housing counselling service;

(b) Investigating allegations of discrimination and referring complaints to appropriate state and federal agencies;

(c) Conducting independent investigations of real estate brokers located in the Richmond Metropolitan Area to determine whether equal opportunity in housing is available, and taking such steps as it may deem necessary to assure such equal opportunity and to eliminate racially discriminatory housing practices.

9. Defendant Havens Realty Corporation is a Virginia Corporation with its principal place of business at Camelot Townhouses and Colonial Court Apartments, 9108-A Quioccasin Road in Henrico County, Virginia. At all times relevant to this action, Havens Realty Corporation has been engaged in the business of real estate brokerage services as to apartment rental units in Richmond. Defendant Rose Jones is an employee of Havens Realty Corporation.

10. Like other metropolitan areas throughout the United States, the Richmond Metropolitan Area, including Henrico County, has been marked by racially segregated residential housing patterns. Neighborhoods have reflected the impact of segregation resulting from the actions of private individuals and groups, restrictive covenants, zoning and other factors, so that area neighborhoods can generally be identified as "white" or "black" neighborhoods. The practice or [sic] "racial steering" engaged in by these defendants, contributes to maintaining existing neighborhood segregation and inhibits the development of stable racially integrated neighborhoods.

11. Defendants treat differently white and non-white prospective lessees on the basis of race or color. Defendants have engaged in practices to the detriment and injury of the plaintiffs herein and others similarly situated by consistently showing only prospective white customers ("customers") rental units in a building occupied primarily by white tenants, by consistently refusing or failing to show black customers ("customers") rental units in the aforementioned building occupied primarily by white tenants, notwithstanding the "listings" for rentals in that building that fall within the category of housing sought by such black customers, and on occasion by failing or refusing to show prospective black customers rental units in a less racially segregated building or by showing such prospective black customers only rental units in the less racially segregated building.

12. The patterns, practices, acts and policies of defendants, as hereinabove alleged, in restraining, limiting, classifying, segregating and otherwise discriminating on the basis of race or color in the rental of residential real estate in Henrico County, and in the rendition of real estate brokerage services in connection therewith, have caused injury to the plaintiff class. Renter plaintiff Coles has been denied the right to rent real property in a predominantly white-occupied building in Henrico County in violation of the 1866 Civil Rights Act, 42 U.S.C. § 1982 and the Fair Housing Act of 1968, 42 U.S.C. § 3604, in the following manner: On July 13, 1978, plaintiff Coles visited the office of Havens Realty Corporation located at the Camelot Townhouses to inquire into available apartments at Camelot Townhouses. Camelot Townhouses is an apartment complex predominantly occupied by whites. Coles was informed that no apartments were available in the Camelot complex. He was told that an apartment was available in the adjoining Colonial Court complex. The Colonial complex is inte-

grated. That same day white tester John Barr telephoned the Havens office and was informed by defendant Rose Jones that an apartment was available in Camelot Townhouses. That same day John Barr visited the Havens office and was informed by Susan Newton, then an employee of Hanvens [sic], that an apartment was available in the Camelot Townhouses.

13. Defendants have evidenced a pattern, practice and policy of racial steering to the specific injury of tester plaintiff Sylvia Coleman, in the following manner:

(a) On March 14, 1978, black tester Sylvia Coleman asked about vacancies at Colonial Court but was told by the defendant Rose Jones that nothing was available; that same day white tester R. Kent Willis asked about vacancies at Colonial Court and was told by defendant Rose Jones that two apartments were available, both at Colonial Court and Camelot Townhouse apartments;

(b) On March 21, 1978, black tester Sylvia Coleman asked generally about vacancies in apartments in Henrico County but was told by defendant Susan Newton that nothing was available; that same day white tester R. Kent Willis asked about vacancies at apartments in Henrico County and was told by defendant Rose Jones that an apartment was available at Colonial Court;

(c) On March 23, 1978, black tester Sylvia Coleman asked Rose Jones about vacancies in defendant's buildings but was told by employee Susan Newton that nothing was available; that same day white tester R. Kent Willis asked about vacancies in the defendant's apartment complexes and was told by employees Rose Jones and Susan Newton that an apartment was available at Colonial Court;

(d) On July 6, 1978, black tester Sylvia Coleman asked about vacancies at the Camelot Townhouses complex, but was told that nothing was available at Camelot Townhouses;

black tester Coleman was told that there was a vacancy at Colonial Court apartments; that same day white tester John Barr asked about vacancies at Camelot Townhouse apartments and was told an apartment was available at Camelot Townhouse apartments.

14. Renter plaintiff Paul Allen Coles and tester plaintiff Sylvia Coleman have, because of their race, been denied the right to rent real property in Henrico County, Virginia, and therefore have been deprived of the advantages and conveniences they would have enjoyed from living in this area and the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices. These individual plaintiffs and the members of the class they represent have been deprived of the right to live in communities that are not limited, classified or segregated on the basis of race or color, in violation of the Fair Housing Act of 1968, 42 U.S.C. § 3601, *et seq.;* and the right to make and enforce contracts for the lease of real estate, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1982.

15. White tester plaintiff R. Kent Willis and the members of the class he represents, have been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices, in violation of the Fair Housing Act of 1968, 42 U.S.C. § 3601, *et seq.*. [sic]

16. Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices. HOME members have, as a result

of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices, in violation of the Fair Housing Act of 1968, 42 U.S.C. § 3601, *et seq.*. [sic]

17. The individual plaintiffs and the class they represent have been subjected to acts, patterns, practices and policies of the defendants, which have created, cultivated and perpetuated a discriminatory "dual" housing market in Henrico County by limiting, classifying and segregating said communities on the basis of race or color, in violation of the Fair Housing Act of 1968, 42 U.S.C. § 3601, *et seq.*. [sic]

18. The plaintiffs have no adequate remedy at law. The individual plaintiffs and the class they represent have suffered, are now suffering and will continue to suffer irreparable harm and injury by the unlawful policies and discriminatory practices of the defendants. The infringement upon the rights of the plaintiffs and the class they represent is grave, immediate and continuing.

WHEREFORE, the plaintiffs pray that this Court enter a judgment:

(a) declaring that defendants' acts, practices and policies complained of herein violate rights secured by the Civil Rights Act of 1866, 42 U.S.C. § 1982, and Title VIII of the 1968 Civil Rights Act, 42 U.S.C. § 3601, *et seq.*;

(b) enjoining the defendants, their agents, employees, successors, assigns, and those acting in active concert, combination or participation with them, from engaging in policies and practices which deprive plaintiffs and the class they represent of rights secured by 42 U.S.C. §§ 1982 and 3601, *et seq.*, including, but not limited to, a judgment:

(i) enjoining defendants from refusing or failing to show

or rent any housing unit owned or managed by the defendants to any person because of race or color;

(ii) enjoining defendants from steering or channelling any prospective renter toward or away from any particular rental unit, complex or neighborhood on account of race or color;

(iii) enjoining defendants from discriminating against any person in the terms, conditions, or privileges of renting, or in the provision of services in connection therewith; and

(iv) enjoining defendants from representing to any person, because of race or color, that any rental unit is not available for inspection or rental when such unit is in fact so available;

(c) ordering defendants to take affirmative action supervised by this Court, to overcome the effect of their past discriminatory actions, such affirmative action to include, *inter alia*:

(i) the soliciting and encouraging of blacks to rent units in predominantly white communities and whites to rent such units in predominantly black and integrated communities;

(ii) the adequate advertising in appropriate publications and circulation of information concerning apartments available in defendants' files;

(iii) the adoption of a uniform system of rules, regulations, codes, etc., together with enforcement procedures, designed to ensure that defendants' past discriminatory actions are not repeated or continued, including the adoption of a policy of hiring personnel in its real estate office without regard to race; and

(iv) the prompt reporting in written form by defendants of such information as the Court deems necessary to enable the efficient monitoring of the defendants' compliance with other parts of the Court's order and the Fair Housing Laws of the United States;

(d) awarding to renter plaintiff Paul Allen Coles the sum of $50,000 in actual damages and $100,000 in punitive damages for the violation of his rights by these defendants;

(e) awarding to each of the tester plaintiffs Sylvia Coleman and R. Kent Willis the sum of $1,000 in actual damages and $1,000 in punitive damages;

(f) awarding to HOME its expenses of testing and monitoring defendants' practices and its expenses pursuant to this litigation;

(g) awarding to plantiffs their costs and reasonable attorney fees in this action; and

(h) granting such additional and further relief as the Court deems just and equitable.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, SYLVIA COLEMAN,
R. KENT WILLIS, and on behalf of all others
similarly situated, and
HOUSING OPPORTUNITIES MADE EQUAL,
a Virginia Corporation

Plaintiffs,

v.

HAVENS REALTY CORPORATION,
a Virginia Corporation
and
ROSE JONES,

Defendants.

Filed Jan. 31, 1979
Clerk, U. S. Dist. Court
Richmond, Va.
Civil Action No. 79-0024

DEFENDANTS' PLEADINGS IN RESPONSE TO COMPLAINT

MOTIONS TO DISMISS

The defendants, by counsel, state that the Complaint filed against them herein fails to state a claim upon which relief can be granted, and the defendants thus move for Dismissal of Complaint, in the particular respects and for the reasons set forth in the numbered paragraphs which follow.

1. As stated in paragraph 1 of the Complaint herein, the plaintiffs' action purports to arise under the Fair Housing Act of 1968 and the Civil Rights Act of 1866. As to the former, both defendants state that it affirmatively appears

on the face of the Complaint that the only allegedly discriminatory act of which the plaintiffs complain herein which took place within 180 days of the filing of the Complaint was that of July 13, 1978. Accordingly, both defendants state that all other claims for which relief is sought herein under the Fair Housing Act of 1968 are time barred. 42 U.S.C. § 3612(a).

2. With regard to the plaintiff Housing Opportunities Made Equal ("HOME"), the defendants state that the Complaint fails to allege any remediable wrong against the corporation itself. The Complaint further fails to allege that any of HOME's approximately 600 individual members reside in or have sought to reside in either of the apartment complexes concerning which complaint is raised in the Complaint, nor for that matter does the Complaint allege that any HOME member resides anywhere in Henrico County. Accordingly, insofar as it asserts claims in behalf of HOME, the Complaint fails to state a cause of action upon which relief may be granted under either the Fair Housing Act of 1968 or the Civil Rights Act of 1866.

3. The defendant Rose Jones states that the allegations of specific incidents contained in paragraph 12 and in paragraph 13(b) and 13(d) fail to inculpate her in any way in the alleged denial of rental housing to the individuals referred to in the said paragraphs, for which reason, insofar as the Complaint seeks relief against the defendant Rose Jones by reason of the said incidents, it fails to state a claim against her upon which relief can be granted.

4. With regard to the tester plaintiffs (Sylvia Coleman and R. Kent Willis), the Complaint nowhere alleges that the tester plaintiffs have made any attempt in good faith to rent residential property from the defendants, and the description of the tester plaintiffs contained in paragraph 7 of the Complaint leads clearly to the opposite conclusion.

The defendants thus state that, insofar as the tester plaintiffs complain of having been themselves denied rental housing, the Complaint fails to state a claim upon which relief can be granted. In his Complaint however, tester plaintiff R. Kent Willis goes further and seeks to ground his claim for relief in the alleged deprivation of his "rights to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." The defendants state that, having failed to allege that he resides in either of the apartment projects concerning which complaint is raised herein, and in failing to allege that he resides within reasonable proximity of either of the said apartment projects, the Complaint of the testor plaintiff R. Kent Willis fails to assert any substantial injury and thus fails to state a claim upon which relief can be granted.

5. The defendants state that the Complaint fails to assert that any of the individual plaintiffs actually offered to rent an apartment in either of the apartment complexes concerning which the individual plaintiffs complain herein, in consequence of which none of the individual plaintiffs has standing to assert a claim that he or she has been denied rental housing by the defendants. The defendants accordingly state that, insofar as the Complaint seeks to recover for the denial of rental housing to the individual plaintiffs, it fails to state a claim upon which relief can be granted.

6. Plaintiffs seek in their Complaint to proceed in class action form. They describe their class in paragraph 2 of their Complaint as "all persons who have rented or sought to rent residential property in Henrico County, Virginia, and who have been, or continue to be, adversely affected by the acts, policies and practices of defendants complained of herein." It is not alleged in the Complaint that any mem-

ber of HOME, nor either the plaintiff Sylvia Coleman or the plaintiff R. Kent Willis, has rented or in good faith sought to rent residential property in Henrico County, Virginia and found himself or herself to have been adversely affected by the acts, policies and practices of defendants concerning which complaint is raised in the Complaint. As defendants read the description of the class contained in paragraph 2 of the Complaint, they conclude that in order to fall within the class, a person must both have rented or sought to rent residential property, *and* been adversely affected. Since it is not alleged that Sylvia Coleman, R. Kent Willis, or any member of HOME has rented or in good faith sought to rent residential property in Henrico County and been adversely affected, it affirmatively appears on the face of the Complaint that Sylvia Coleman, R. Kent Willis, and Housing Opportunities Made Equal and the latter's members do not have claims which are typical of the claims of the plaintiff class, cannot fairly and adequately protect the interests of the plaintiff class, and do not have interests which are coextensive with those of the plaintiff class. Defendants accordingly state that, insofar as they seek to proceed in class action form, the plaintiffs Sylvia Coleman, R. Kent Willis, and HOME do not state a claim upon which class relief may be granted.

7. With regard to the class action issue, this leaves the question of whether the plaintiff Paul Allen Coles may prosecute his Complaint in class action form. Should his Complaint be certified as a class action, and should this case result in an outcome adverse to Mr. Coles, it is evident that the rights of all of the members of the alleged class may be adversely affected. Unlike the other individual plaintiffs, Mr. Coles bases his complaint upon only one individual act of alleged discrimination, described in the

allegations in paragraph 12 of the Complaint. Having failed to rent the apartment he desired on July 13, 1978, Mr. Coles does not allege in his Complaint that he took any further steps to try again; rather, based upon that single incident, he seeks to impose upon the defendants liability for substantial damages, injunctive and affirmative relief, and to represent a large class of persons in so doing. Further, having apparently sought on only one occasion to rent an apartment from the defendants, it appears questionable that the plaintiff Paul Allen Coles can demonstrate the existence of the patterns and practices of which he and his fellow plaintiffs generally complain in their Complaint. Accordingly, insofar as he seeks to proceed in the class form, the Complaint of Paul Allen Coles fails to state a claim upon which relief in class form may be granted.

8. Finally, in order to proceed with their action in class form the plaintiffs must show that they can fairly and adequately protect the interests of the plaintiff class they undertake to represent. If, as the defendants have stated above, the plaintiffs other than the plaintiff Coles have filed their action after the expiration of 180 days from the incidents concerning which they complain, then it appears from the face of the Complaint that those plaintiffs and their attorneys are incapable of fairly and adequately protecting their own interests herein, much less the interests of the plaintiff class they undertake to represent. Accordingly, and in the absence of adequate strategic or other explanation for the delay in filing the Complaint herein until after 180 days following the last incident concerning which Complaint is raised herein, this Honorable Court should find that, insofar as it seeks to proceed in class form, the Complaint of the plaintiffs Coleman, Willis, and HOME fails to state a claim upon which class relief can be granted.

ANSWER

The defendants, by counsel, without waiving the Motions to Dismiss set forth hereinabove, for their Answer to the numbered paragraphs of the Complaint herein state as follows:

9. Insofar as paragraph 1 alleges wrongdoing on the part of the defendants, it is denied.

10. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 2 with regard to the identity of the plaintiffs, and thus deny same. Defendants deny that any act of theirs has unlawfully and adversely affected any of the plaintiffs herein.

11. Defendants deny that they have committed any wrong to the plaintiffs or to any other persons in the alleged class which they represent, and thus deny the allegations of paragraph 3 that that class is so numerous that joinder of all members is impracticable.

12. Defendants deny the allegation of paragraph 4 that they have violated the cited statutes and engage in the practice of racial steering, and lack sufficient knowledge to admit or deny the remaining allegations, and thus deny all of the allegations of paragraph 4.

13. The allegations of paragraphs 5 and 6 of the Complaint are denied.

14. With regard to the allegations of paragraph 7 of the Complaint, defendants deny that they have injured any of the plaintiffs by any discriminatory act, and lack sufficient knowledge to admit or deny the remaining allegations, and thus deny all of the allegations of paragraph 7.

15. Defendants lack sufficient knowledge to admit or deny the allegations of paragraph 8 and thus deny same. Defendants further state that HOME lacks standing to assert any claim herein.

16. The allegations of paragraph 9 of the Complaint are admitted.

17. Defendants deny the allegation of the last sentence of paragraph 10 and lack sufficient knowledge to admit or deny the remaining allegations, and thus deny all such allegations.

18. The allegations of paragraph 11 are denied.

19. In response to the allegations of paragraph 12 of the Complaint, defendants admit that Camelot Townhouses and Colonial Court Apartments are both apartment complexes predominantly occupied by whites, but defendants state that both complexes are racially integrated. The remaining allegations of paragraph 12 are denied.

20. The defendant Havens Realty Corporation denies the allegation of paragraph 13. The defendant Rose Jones states that at this time she has no specific recollection of any of the contacts concerning which allegations are made in paragraph 13, that she has not knowingly misrepresented the status or availability of any apartment unit on the occasions alleged, and she therefore denies the allegations of paragraph 13.

21. The allegations of paragraphs 14, 15, 16, 17, and 18 of the Complaint are denied.

22. The assertions contained in numbered paragraphs 1 through 8 of this pleading, hereinabove, are hereby reincorporated herein by this reference as if set forth verbatim, and the defendants assert the matters stated in each of the said paragraphs as affirmative defenses to the allegations of the Complaint herein.

23. Defendants deny that they have been guilty of any discriminatory act, pattern or practice as set forth in the Complaint.

24. Defendants deny that they are indebted to plaintiffs, or any of them, in any amount, by way of compensa-

tory or punitive damages, attorneys fees, or other monetary sums, and further deny that they are liable for any other form of relief, injunctive or otherwise.

25. Defendants reserve the right to amend this pleading if at any time they be so advised up to and including the trial of this action.

WHEREFORE, the defendants demand that the action filed against them be dismissed and that they be awarded their costs of court expended herein.

HAVENS REALTY CORPORATION
AND ROSE JONES
By: /s/ RICHARD W. HOGAN
Of Counsel

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CERTIFICATE OF SERVICE

This is to certify that on the 31st day of January, 1979, a true copy of the foregoing Defendants' Pleadings in Response to Complaint Motions to Dismiss and Answer was hand delivered to James F. Stutts, Esq., Suite 1506, 700 Building, 700 East Main Street, Richmond, Virginia 23219, Counsel for the plaintiffs; also on this day a true copy of the foregoing pleading was mailed to Theodore C. Hirt, Esq., Fried, Frank, Harris, Shriver, & Kampelman, 600 New Hampshire Avenue, NW, Suite 1000, Washington, D.C. 20037, also counsel for the plaintiffs.

/s/ RICHARD W. HOGAN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, SYLVIA COLEMAN,
R. KENT WILLIS, and on behalf of all others
similarly situated, and
HOUSING OPPORTUNITIES MADE EQUAL,
a Virginia Corporation

Plaintiffs,

v.

HAVENS REALTY CORPORATION,
a Virginia Corporation and
ROSE JONES,

Defendants.

Civil Action No. 79-0024

DEFENDANTS' BRIEF IN SUPPORT OF MOTIONS TO DISMISS

The defendants, by counsel, pursuant to Rule 11(F) of the Local Rules of Practice of this court, submit the following in support of their motions to dismiss the Complaint herein:

The motion filed herewith contains a concise statement of the facts pertinent to each theory and supporting reasons. The citations of authorities upon which the movants rely are as follows (paragraph numbers correspond with those of the Motions to Dismiss):

1. 42 U.S.C. § 3612(a); *Hickman v. Fincher,* 483 F.2d 855 (4th Cir. 1973).
   Stingley v. City of Lincoln Park, 429 F.Supp. 1379, 1390-91 (DC ED Mich 1977).

2. *Warth v. Seldin*, 422 U.S. 490, 45 L.E. 2d 343, 95 S.Ct. 2197 (1975).
   TOPIC v. Circle Realty, 532 F. 2d 1273 (9th Cir. 1976) See also, as to standing under Civil Rights Act of 1866, *Trafficante v. Metropolitan Life Ins. Co.*, 446 F.2d 1158 (9th Cir. 1971), rev'd on other grounds 409 U.S. 205, 34 L.E. 2d 415, 93 S.Ct. 364.
3. FRCP 8(a).
4. *Jackson v. Dukakis*, 526 F.2d 64 (1st Cir. 1975).
   Evans v. Lynn, 537 F.2d 571 (2nd Cir. 1975).
   TOPIC v. Circle Realty, supra.
5. *Jackson v. Dukakis*, supra.
   Evans v. Lynn, supra.
   TOPIC v. Circle Realty, supra.
6. FRCP 23.
   Thaxton v. Vaughan, 321 F.2d 474 (4th Cir. 1963).
   Doctor v. Seaboard Coastline, 540 F.2d 699 (4th Cir. 1976).
7. FRCP 23.
8. FRCP 23.
   Cabrera v. Board of Elections, 350 F. Supp. 25 (DC NJ 1972).

HAVENS REALTY CORPORATION
AND ROSE JONES

By: /s/ RICHARD W. HOGAN
Of Counsel

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Richmond, VA 23241

CERTIFICATE OF SERVICE

This is to certify that on the 31 day of January, 1979, a true copy of the foregoing Defendants' Brief in Support of Motions to Dismiss was hand delivered to James F. Stutts, Esquire, Suite 1506, 700 Building, 700 East Main Street, Richmond, Virginia 23219, Counsel for the plaintiffs; also on this day a true copy of the foregoing pleading was mailed to Theodore C. Hirt, Esquire, Fried, Frank, Harris, Shriver, & Kampelman, 600 New Hampshire Avenue, NW, Suite 1000, Washington, D. C. 20037, also counsel for the plaintiffs.

/s/ RICHARD W. HOGAN

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, et al

v.

HAVENS REALTY CORPORATION, et al

Civil Action No. 79-0024-R
Filed Feb. 16, 1979
Clerk, U. S. Dist. Court
Richmond, Va.

ORDER

In accordance with the memorandum this day filed, the claims of plaintiffs Sylvia Coleman, R. Kent Willis, and Housing Opportunities Made Equal are hereby DISMISSED for failure to state a claim on which relief may be granted. In all other respects, defendants' motion to dismiss filed 31 January 1979 is hereby DENIED.

Let the Clerk send a copy of this order and memorandum to all counsel fo [sic] record.

/s/ D. DORTCH WARRINER
United States District Judge

Date: 16 February 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, et al

v.

HAVENS REALTY CORPORATION, et al

Civil Action No. 79-0024-R
Filed Feb. 16, 1979
Clerk, U. S. Dist. Court
Richmond, Va.

MEMORANDUM

This matter is before the Court on defendants' motion to dismiss of 31 January 1979. The time allotted by the Local Rules for plaintiffs' reply to this motion has expired, and plaintiffs have not responded by memorandum or otherwise. Accordingly, the motion is now ripe for disposition. The defendants' motion has several parts, each of which will be considered separately.

Defendants state that all of plaintiffs' claims but one are based on acts of discrimination which occurred more than 180 days before the filing of the complaint in this case. Accordingly, defendants argue, all claims under the Fair Housing Act of 1968 except that based on the alleged discriminatory act on 13 July 1978 are barred by the applicable statute of limitations, 42 U.S.C. § 3612(a). This claim is well taken, and the action will be dismissed as to all barred claims. The Court notes that none of plaintiffs' claims are time-barred under the two-year statute of limitations applicable to 42 U.S.C. § 1982.

Defendants argue that the corporate plaintiff, Housing Opportunities Made Equal (HOME) is not a proper party

plaintiff to this law suit. The Court believes that the law is clear that HOME is not a proper party to this action and cannot be accorded any relief by this Court. *Warth v. Seldin*, 422 U.S. 490 (1975); *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir. 1976). Accordingly HOME will be dismissed as a party plaintiff.

Defendants claim that the "tester" plaintiffs (Coleman and Willis), the persons who allegedly sought to rent from defendants in order to prove a pattern of discrimination, have suffered no injury and thus are entitled to no relief. Plaintiffs' complaint makes it clear that Coleman and Willis did not attempt in good faith to rent residential property from any defendant, but instead sought only to develop evidence for use in this law suit. Their action seeks to vindicate the rights of third parties, dispite [sic] their allegation of deprivation of benefits from interracial associations. In asserting the claim based on these deprivations, Coleman and Willis assert no more than the general public interest. Furthermore, there is no allegation that absent the defendants' discriminatory practices, Coleman and Willis would reside in intergrated [sic] communities. Thus, Coleman and Willis must be dismissed as parties plaintiff.

Defendants argue that none of the plaintiffs allege that they actually offered to rent an apartment from any defendant, and thus may not maintain an action or [sic] denial of rental housing. However, the gravamen of plaintiffs' complaint is that when black persons inquired as to vacancies, they were told that none existed. Under these circumstances, no affirmative offer to rent need be shown in order to state a claim.

Defendants suggest that Coleman, Willis, and HOME are not proper class representatives. The Court's ruling that these plaintiffs' claims be dismissed make it unnecessary to consider this claim. However, the Court does not agree that

plaintiff Coles cannot represent a class merely because his claim is based on a single individual act of discrimination. Further, while plaintiffs' failure to file their complaint herein until some claims had been time-barred—and their failure to respond to defendants' motion and brief—are indications that plaintiffs may not adequately represent the interest of the class, these matters are ones for the Court to consider on a motion for class certification after there has been an opportunity for discovery of the question of class certification to determine the factual questions raised by defendants' contentions.

An appropriate order shall issue.

/s/ D. DORTCH WARRINER
United States District Judge

Date: 16 February 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, SYLVIA COLEMAN, R. KENT WILLIS, and on behalf of all others similarly situated, and HOUSING OPPORTUNITIES MADE EQUAL, a Virginia Corporation,

Plaintiffs,

v.

HAVENS REALTY CORPORATION, a Virginia Corporation, and ROSE JONES,

Defendants.

Filed Feb. 16, 1979
Clerk, U. S. Dist. Court
Richmond, Va.
Civil Action No. 79-0024-R

MOTION TO RECONSIDER

Come now the platiniffs [sic] Sylvia Coleman, R. Kent Willis and Housing Opportunities Made Equal and move the Court to reconsider its Order herein dated February 16, 1979 dismissing the said plaintiffs' complaint and in support of their motion show unto the Court the following:

1. The plaintiffs filed their Complaint against the defendants with this Court on January 9, 1979.

2. On January 31, 1979 the defendants filed a Motion to Dismiss and an Answer in response to the said plaintiffs' Complaint.

3. Counsel for the defendants agreed to a request from

counsel for the plaintiffs to an extension of time to February 20, 1979 within which to file a brief in response to defendants' Motion to Dismiss.

4. Plaintiffs have prepared a Memorandum in response to defendants' Motion to Dismiss and are prepared to file the Memorandum with the Court in accordance with counsels' agreement.

Wherefore, the said plaintiffs pray the Court to reconsider its Order entered this date and to permit the plaintiffs to file a Memorandum in response to the defendants' Motion to Dismiss.

SYLVIA COLEMAN,
R. KENT WILLIS, and
HOUSING OPPORTUNITIES MADE EQUAL

By /s/ JAMES F. STUTTS
Counsel

I ask for this:

/s/ JAMES F. STUTTS
Attorney for plaintiffs

Seen:

/s/ RICHARD W. HOGAN
Attorney for defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, et al.

Plaintiffs,

v.

HAVENS REALTY CORPORATION, et al.,

Defendants.

Filed Feb. 20, 1979
Clerk U.S. Dist. Court
Richmond, Va.
Civil Action No. 79-0024-R

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs hereby oppose the motion to dismiss, which defendants combined with their answer, filed herein on January 31, 1979. Defendants have not shown any basis for dismissal of any portion of the complaint, and they have not discussed nor explained the list of cases which they appended to this motion.

INTRODUCTION

This action was filed on January 9, 1979, by three individually-named plaintiffs, Paul Allen Coles, Sylvia Coleman and R. Kent Willis, and by one organizational plaintiff, Housing Opportunities Made Equal (HOME), against defendant Havens Realty Corporation and one of its employees, Ms. Rose Jones. Defendants manage and perform real estate brokerage services at two adjacent apartment

buildings in Henrico County, Virginia, namedly, Camelot Townhouses and Colonial Court Apartments. The individual plaintiffs sue as members of a class of individuals in the Richmond metropolitan area who have been (and continue to be) injured by defendants' practice of "racial steering," a form of racial discrimination which violates both the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1982. HOME, an organization which assists individuals of all races in obtaining housing in the Richmond metropolitan area, is joined as plaintiff because defendants' practices have injured it and frustrated its attempts to promote equal opportunity in housing. Plaintiffs seek both damages to compensate them for defendants' injury and an injunction which will assure defendants' future compliance with the aforementioned fair housing laws.

Defendants have moved to dismiss various portions of the complaint, including those portions which allege the propriety of a class action in this case. On February 1, 1979, defendants filed a notice of deposition as to each of the named plaintiffs and a request for production of documents.

Before discussing the legal issues raised by defendants' motion, it is important to review the relevant facts of this case. This action is a result of illegal practices engaged in by defendants in connection with their management and leasing of apartments at two adjacent apartment buildings in Henrico County. It is based on "racial steering," a practice by which real estate brokers like defendants perpetuate segregated housing patterns by channeling prospective renters to or away from particular rental units. Defendants have practiced racial steering at both of their apartment buildings, Camelot Townhouses, which plaintiffs believe is occupied exclusively by whites, and Colonial Court Apart-

ments, which plaintiffs believe is occupied exclusively or predominantly by whites.

From reports received by renters who sought HOME'S counseling services, HOME had suspected that defendants practiced racial steering. HOME performed several tests in the spring and summer of 1978 to determine the existence of such segregationist policies. As the complaint indicates (¶ 13), in each case a black tester was steered away from the apartments by defendants after being told that nothing was available, while a white tester visiting defendants' rental office at approximately the same time was told that apartments were available. On July 13, 1978, plaintiff Coles, a black man who had been looking for an apartment in Henrico County, was specifically told that nothing was available at Camelot Townhouses and was told to check at the Colonial Court Apartments office. In contrast, a white tester John Barr (employed by HOME, but not a named plaintiff in this case) inquired as to available rentals at Camelot Townhouses that same day, both by telephone and in person, and was told that an apartment was available in that building. While defendants deny the obvious conclusion compelled by these tests, plaintiffs believe that these incidents represent typical examples of a pattern of racial discrimination which probably extends backward in time for years and continues to this very day.

With the exception of defendants' class action allegations, which go to the merits of plaintiffs' claims and cannot be decided at this stage of the litigation, plaintiffs will respond here to each of the points made in the motion to dismiss.[1]

[1] Unless the Court requests that the parties brief the class action aspects of this case or require that plaintiffs move for certification at this point in time, plaintiffs believe that any such decision must be deferred pending discovery. It is established that a defendant's objection to class action statuts [sic] is premature prior to discovery. *Roman v. ESB, Inc.*, 550 F.2d 1343, 1348 (4th Cir. 1976); *Dillon v.*

Defendants' basic claim is that only plaintiff Coles has standing to sue in this case since the Complaint fails to allege that plaintiffs Willis and Coleman "have made any attempt in good faith to rent residential property from the defendants." (Motion to Dismiss, ¶ 4). Defendants' second claim as to standing is that HOME does not have standing in the absence of allegations that its members have sought to rent an apartment from defendants. Finally, defendants assert that the claims of plaintiffs Willis and Coleman are barred under the six month limitation period of the 1968 Fair Housing Act. Defendants do not ask and cannot ask that the complaint be dismissed as to plaintiff Coles.

ARGUMENT

I.

The Statute Of Limitations Has Not Run As To Any Of The Claims In This Case.

This action has been filed as a class action to redress defendants' persistent and ongoing practice of illegal racial steering. Plaintiffs contend that they "have suffered, are now suffering and will continue to suffer irreparable harm and injury by the unlawful policies and discriminatory practices of the defendants" (Complaint, ¶ 18) and have alleged a continuing pattern of discrimination by defendants (Complaint, ¶¶ 1, 4, 11 and 13).

Although defendants challenge the timeliness of the claims of plaintiffs Willis and Coleman under Title VIII of

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Bay City Construction Co., Inc., 512 F.2d 801, 804 (5th Cir. 1975); *Wilson* v. *Allied Chem. Corp.*, 75 F.R.D. 45, 47 (E.D. Va. 1977). As this Court stated, a claim that the prerequisites of a class action do not exist in a case "goes to the Court's determination as to whether a class action be declared. Prior to at least preliminary discovery, such an allegation is premature." *Burwell v. Eastern Airlines, Inc.*, 394 F.Supp. 1361, 1370 (E.D. Va. 1975).

the 1968 Act, which has a six-month limitation period, that argument must be rejected by the Court. It is clear that where a defendant has discriminated against an entire class and engages in a continuing course of discrimination, the statute of limitations is tolled by such wrongful acts. *Macklin* v. *Spector Freight Systems, Inc.*, 479 F.2d 979, 987 (D.C. Cir. 1973) (Title VII case); *Austin* v. *Reynolds Metal Co.*, 327 F.Supp. 1145, 1152 (E.D. Va. 1970) (Title VII case); *Burwell* v. *Eastern Airlines, Inc.*, 304 F.Supp. 1361, 1367 (E.D. Va. 1975) (Title VII case). This principle has been applied in one Circuit case involving continuing discrimination in the rental of housing, and should govern the disposition of this motion. *Baker* v. *F&F Investment Co.*, 420 F.2d 1191, 1200 (7th Cir. 1970), *cert. denied*, 400 U.S. 821 (1970); see also *Meyers* v. *Pennypack Woods Home Ownership Association*, 559 F.2d 894, 898 (3rd. Cir. 1977). As the Court stated in the *Baker* case, which involved a continuing pattern of discrimination by lenders and realtors against blacks with regard to purchases of homes:

> Plaintiffs have alleged wrongs committed by defendants which continue during the entire lives of the individual purchase contracts. They have alleged a conspiracy among defendants, the object of which was the establishment of a continuing relationship with individual plaintiffs. That relationship, by the same token, constituted a prolonged and continuing invasion of the rights of the purchasers. As in *Hazeltine Research, Inc.* v. *Zenith Radio Corporation*, 418 F.2d 21 (7th Cir. 1969), the limitations periods commence to run from the last overt act of the conspiracy, permitting plaintiffs to recover "for damages suffered within the damage period as a result of an overt act repetitious of the unlawful pre-[limitation] period acts occurring in the damage period" (418 F.2d at p. 25).

Accordingly, defendants' attempt to have plaintiffs Willis and Coles eliminated either as plaintiffs or as class representatives must fail.[2] The claims of both individuals are timely under both statutes and requires the denial of defendants' motion as to this aspect of the complaint.

II.

These "Tester" Plaintiffs Have Standing To Sue Because Defendants' Illegal Racial Steering Practices Not Only Injure Blacks, The Direct And Intended Victims Of Defendants' Discriminatory Actions, But Also Injure All Individuals Interested In Racially Integrated Communities.

Tester plaintiffs R. Kent Willis, a white man, and Sylvia Coleman, a black woman, have standing to sue under both the Fair Housing Act of 1968 and the Civil Rights Act of 1866, consistent with the general Article III "case or controversy" requirements which govern standing. These individuals have been denominated "tester plaintiffs," because they each have contacted defendants in the course of their employment by HOME to determine if defendants violate the Fair Housing Laws of the United States. However, these plaintiffs do not sue as "testers," but as individuals (and representatives of a larger class) who believe that the benefits of integrated communities inure to whites and blacks

[2] Defendants must concede that plaintiff Coleman's complaint is not barred under the two year limitation period of 42 U.S.C. § 1982. Although plaintiffs did not specifically plead that statute as to plaintiff Willis, he would be a proper plaintiff under that statute. Because of defendants' apparent questioning of Willis' ability to represent white plaintiffs under 42 U.S.C. § 3612, plaintiffs are willing, should the Court so desire, to amend the complaint in order to add white tester John Barr as a named plaintiff. Such an amendment would eliminate any uncertainty as to whether whites injured by defendants' practices require an individual representative whose claims are identical in all respects.

alike, and who are injured by defendants' racial steering practices, practices which preserve segregated neighborhoods (in this case segregated apartment complexes) because such illegal practices deprive them of the important benefits of interracial associations. (Complaint, ¶¶ 14 and 15).

Contrary to defendants' argument on this issue, the cases on standing under various civil rights statutes generally have held that plaintiffs such as Willis and Coleman have the requisite standing to complain about civil rights violations. The leading case on this point (not cited by defendants) is *Village of Bellwood* v. *Gladstone Realtors,* 569 F.2d 1013 (7th Cir.), *cert. granted,* 46 U.S.L.W. 3765 (June 7, 1978), now awaiting a decision by the Supreme Court. In *Bellwood, supra,* various village residents sued defendant realtors for "steering" prospective home buyers to various neighborhoods based upon their race. None of the residents (four were white and two were black) were a *bona fide* home seeker, but each asserted in their complaints that they had been denied "their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society." Each of the individual plaintiffs had posed as a prospective home buyer when visiting defendants; "none were making bona fide efforts to purchase homes in the affected area." 569 F.2d at 1015.

The Seventh Circuit held that these "tester" plaintiffs had thereby demonstrated the requisite "injury in fact" under cases such as *Baker* v. *Carr,* 369 U.S. 186 (1962). The Court had no doubt that the complaints satisfied the basic requirement of standing—"that the plaintiff must show actual or threatened injury to himself that is likely to be redressed or avoided by a favorable decision." It also con-

cluded that the rights asserted by these plaintiffs were within the "zone of interest" protected by the 1968 Fair Housing Act. It expressed its strong disagreement with a contrary view expressed in *TOPIC* v. *Circle Realty*, 532 F.2d 1273 (9th Cir. 1976), *cert. denied*, 429 U.S. 859 (1976), which improperly had construed various provisions of the 1968 Fair Housing Act to deny standing to tester plaintiffs. The *Bellwood* court did not consider whether standing would be conferred also by the 1866 Civil Rights Act.

Although defendants rely on the *TOPIC* case for their contention that tester plaintiffs do not have standing, it should be noted that the *TOPIC* decision has been severely criticized by courts which have passed on this issue. *See e.g. Wheatley Heights Neighborhood Coalition* v. *Jenna Resales Co.*, 429 F.Supp. 386, 491 (E.D. N.Y. 1977). Plaintiffs will not review here the arguments in the *TOPIC* case, except to note one of the fundamental flaws in the decision, criticized by subsequent decisions. That Court, in reviewing the statutory framework of the 1968 Act, properly noted that two distinct forms of relief were available under that statute to those injured by discriminatory housing practices—a direct action in the federal courts under 42 U.S.C. § 3612 or resort to administrative remedies through the Department of Housing and Urban Development or an appropriate state agency under 42 U.S.C. § 3610. It then held that, in view of the language used in section 3610, which authorized relief to any "person aggrieved" under the Act, those white individuals who were "indirectly" injured by discrimination were relegated to the administrative remedy and so were barred from pursuing a court action. However, nowhere did the *TOPIC* court indicate any basis, either in the language or legislative history of the 1968 Act, which supported that conclusion. See *Village of Bellwood* v. *Glad-*

stone Realtors, supra, 469 F.2d at 1019. The reasoning of the *TOPIC* decision certainly renders it inapplicable to this case.[3]

Defendants' apparent reliance on *Trafficante* v. *Metropolitan Life Insurance Company,* 409 U.S. 205 (1972), to support their claim that the "tester plaintiffs" lack standing also is misplaced since it directly contradicts that claim. In *Trafficante,* a case brought under the Fair [sic] U.S.C. § 1982, both a black and a white tenant of a San Francisco apartment complex sued the apartment owner-operator, alleging that it was engaged in discriminatory housing practices and had maintained a "white ghetto," and deprived both plaintiffs of their right to live in a racially integrated community, with its attendant social, political and other benefits. The Supreme Court unanimously reversed the Ninth Circuit's holding that the 1968 Act was limited to complaints brought by persons who were the direct objects of discriminatory housing practices. With respect to private lawsuits brought under the 1968 Act, the Court concluded that Congress had intended to define standing as broadly as permitted by the Constitution, and stated that the injury to existing tenants in the complex was "the loss of important benefits from interracial associations." 409 U.S. at 209-210.[4] The Court had no difficulty in concluding that the complaint presented a live dispute "in an adversary context." As it concluded:

[3] It is not clear if defendants also base their standing argument on the *TOPIC* Court's discussion of "indirect" injury—its holding that the interest in living in an integrated community was too attenuated when applied to a large area of metropolitan Los Angeles. It is important to recognize here, as in the *Trafficante* case discussed herein, that defendants' discriminatory practices are apparently limited to two apartment complexes in a discrete geographic area, but result in discriminatory impact beyond those buildings.

[4] The Court found it unnecessary to determine whether standing existed under 42 U.S.C. § 1982, 409 U.S. 209 n. 8, but the majority gave no indication that its result would be different under that statute.

> Injury is alleged with particularity, so there is not present the abstract question raising problems under Art III of the Constitution. The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, "the whole community," 114 Cong Rec 2706, and as Senator Mondale who drafted § 810(a) said, the reach of the proposed law was to replace the ghettos "by truly integrated and balanced living patterns." 114 Cong Rec 3422.

409 U.S. at 211.

This case is distinguishable from *Trafficante, supra,* insofar as no named plaintiff now lives in either of the two apartment complexes managed by defendants. However, the tester plaintiffs sue in this case (as does plaintiff Coles) on behalf of that class of persons who wish to enjoy the benefits of living in a racially integrated community, but who are injured by defendants' practices which cause injury far beyond the immediate impact they have as to maintaining two segregated housing complexes. Defendants cannot deny standing to these representative plaintifs [sic] because their racially exclusionary policies are so covert, and so far so successful, that the present white tenants in the Camelot Townhouses and Colonial Court Apartments do not know of defendants' illegal practices. Plaintiffs expect that discovery and notice to class members will eliminate defendants' objections to standing and demonstrate that defendants' practices also directly injure the white (and black, if any) tenants of the two apartment buildings at issue here. As the Seventh Circuit declared in the *Bellwood* case: "Racial steering, by its nature, is a subtle form of discrimination that is difficult if not impossible to prove otherwise than by comparing the areas to which homeseekers of different races are directed." 569 F.2d at 1016. Nor can defendants prevail

by simply labeling plaintiffs' allegations as not presenting a "substantial injury." (Motion to Dismiss, ¶ 6).

Plaintiffs assert the denial of specific rights and benefits as a result of defendants' actions; there is a nexus between their injury and acts, and affirmative relief is likely to benefit plaintiffs (and those whom they represent) by extending the benefits of racially integrated housing to those denied it.[5] The fact that defendants may object to "meddling" by these tester plaintiffs cannot be allowed to obscure defendants' desire to prevent any scrutiny of their discriminatory practices.

An independent basis for standing exists for plaintiffs Willis and Coleman, 42 U.S.C. § 1982. While few decisions have discussed the standing issue under the 1866 Civil Rights Act, no sound reason exists which would deny standing to the plaintiffs under that statute. The Third Circuit, in the recent case of *Meyers* v. *Pennypack Woods Home Ownership Association*, 559 F.2d 894, 898 (3rd. Cir. 1977), stated that a black plaintiff "tester" would have standing under 42 U.S.C. § 1982. In the course of its opinion, the Court cited with approval a series of Supreme Court and Court of Appeal opinions which conferred standing upon testers in other forms of civil rights litigation. For instance, in *Smith* v. *Young Men's Christian Association of Montgomery, Inc.*, 462 F.2d 634, 645-646 (5th Cir. 1972), the Court held that blacks who applied for YMCA member-

[5] Defendants' citation of *Evans* v. *Lynn*, 537 F.2d 571 (2d Cir. 1976) has no relevance to this case. There the residents of one community sued governmental officials for their alleged failure to undertake improvement projects in another part of the metropolitan area. The majority held that standing properly was denied since the plaintiffs alleged no specific adverse results to themselves as a result of defendants' actions and that even if the grants were approved for the potential projects, it was pure speculation that the monies would be devoted to a project which might make housing more available to plaintiffs.

ship solely in the attempt to integrate it had standing to complain about its segregation.

In *Evers* v. *Dwyer*, 358 U.S. 202, 204 (1958), the Supreme Court held that a black who boarded a bus and sat in the "white only" section solely in order to test the legality of the bus company's policy had standing to sue and presented "the existence of a live controversy" warranting declaratory relief. As the Court concluded: "That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant." Finally, the Fourth Circuit, in a case challenging discriminatory employment policies, affirmed a decision that black women in a class action who applied for jobs at a segregated factory had standing to sue even though their motive in applying for positions was to test defendant's employment practices rather than seek actual employment. *Lea* v. *Cone Mills Corporation*, 438 F.2d 86 (4th Cir. 1971).

In this case, the tester plaintiffs have stated injury caused by defendants' racial steering, the loss of the benefits of living in racially integrated communities. Furthermore, as to plaintiff Coleman, a black woman, it is clear from the complaint in this case that she is a direct victim of discrimination —she was denied an opportunity to lease an available apartment solely because of her race. This Court, therefore, should hold that both tester plaintiffs have standing in this case.

III.

Housing Opportunities Made Equal (HOME) Has Standing To Sue In This Case As An Organization Whose Efforts To Promote Integration In Housing Have Been Hindered By Defendants' Illegal Practices.

Defendants' basic allegation as to HOME's alleged lack of standing is their claim "that the Complaint fails to allege

any remediable wrong against the corporation itself." Defendants also allege that the complaint is defective because it does not state that HOME's members reside in (or have sought to reside in) defendants' two apartment complexes or that such members live in Henrico County. (Motion to Dismiss, ¶ 2). Defendants' summary argument should be rejected by this Court since HOME has demonstrated "injury in fact", injury which directly affects its corporate operations and frustrates one of its basic purposes. (Complaint, ¶ 8).

The law of standing requires that the plaintiff "alleg[e] such a personal stake in the outcome of the controversy" as to justify its invocation of federal court jurisdiction and to warrant the court's exercise of its remedial powers on plaintiff's behalf. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). In determining whether standing exists, a court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party . . ." *Warth* v. *Selden*, 422 U.S. 290 [sic], 501 (1975).

In this case, HOME has satisfied the test for standing. It has established that, as an organization dedicated to increasing housing opportunities for all individuals in the Richmond Metropolitan Area, it has undertaken various efforts to make equal opportunity in housing a reality. Such efforts include operation of a housing counselling service and investigating whether racial discrimination in housing exists. This has resulted in its conducting of "tests" to determine whether black and white applicants for rentals are treated differently—a result it found in this case. HOME also has alleged, and the court must accept as true for the purpose of defendants' motion, that defendants' actions have interfered with its efforts to make housing available to minorities in the Richmond area. (Complaint, ¶ 6).

These facts alone should establish HOME's standing, for it has demonstrated "injury in fact," an injury directly attributable to defendants' illegal practices.[6] Defendants' citation to *Warth* v. *Selden, supra,* which involved exclusionary zoning practices, does not suggest a contrary conclusion. In that case, various individuals and several groups sued a suburban town for its alleged exclusion of law [sic] and middle income families. The Court held that a nonprofit organization, Metro-Act, could not sue on behalf of its members, town residents who allegedly were injured by defendants' zoning policies. Unlike HOME in this case, Metro-Act did not assert any injury to itself caused by these policies, so the Court only had before it the question of Metro-Act's right to enforce the rights of third parties. 422 U.S. at 512-514. HOME has alleged direct injury to itself (Complaint, ¶ 14), an injury which establishes its independent right to invoke federal court jurisdiction.[7]

Defendants do not cite a case decided by the Supreme Court after *Warth* v. *Selden, supra,* where it held that a nonprofit corporation interested in furnishing housing to low income families had standing to complain about a village's exclusionary zoning policies. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977), it stated that the corporation's injury was

[6] Since defendants have declared their intention to depose a designated official of HOME on February 27, 1979, it is likely that further factual support for HOME's standing will be available for this Court's consideration. Accordingly, plaintiffs respectfully request that any ruling on this point be deferred pending this discovery.

[7] Defendants suggest that HOME is really suing only on behalf of its members and then claim that no showing exists that HOME members have sought housing from defendants (Motion to Dismiss, ¶ 2). This avoids the real issue—whether white and black citizens may complain about the denial to them of the right to live in racially integrated communities. This injury exists whether or not such citizens have made application to live in a particular building or complex.

not limited to the fact that it had incurred financial costs as a result of defendant's acts, and noted that "[i]t has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing." As the Court concluded:

> MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest.*** The specific project MHDC intends to build, whether or not it will generate profits, provides that "essential dimension of specificity" that informs judicial decisionmaking. [citations omitted.] 429 U.S. at 263.

The standing of organizations like HOME has been established in a number of recent cases. In *Park View Heights Corporation* v. *City of Black Jack*, 467 F.2d 1208, 1213-1214 (8th Cir. 1972), the Eighth Circuit held that two nonprofit corporations concerned with developing low and moderate income housing had standing to challenge a restrictive zoning ordinance. It noted the interest of the corporations and the identity of interests between the corporations and the residents it represented—both desired to "be free from discriminatory housing practices." Similarly, in *Heights Community Congress* v. *Rosenblatt Realty, Inc.*, 73 F.R.D. 1, 3-4 (N.D. Ohio 1975), an organization comparable to HOME was held to have standing where it alleged that "the conduct of the defendant directly obstructs, frustrates and damages the [plaintiff] in achieving its objective by impeding the processes which are used to benefit the entire community of Cleveland Heights..." The Court had no difficulty in finding standing under the strong language

in the *Trafficante* case, *supra*, regarding the importance of the benefits from interracial associations. See also *English* v. *Town of Huntington*, 335 F.Supp. 1369 (E.D. N.Y. 1970) (holding that township committee on human relations had standing to sue in action claiming denial of equal protection and failure of township officials to comply with requirement to provide housing to persons displaced by urban renewal project.)

Based on these authorities, there should be no doubt in this case that HOME has standing. The injury suffered by HOME as a result of defendants' actions is "likely to be redressed by a favorable decision," *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, *supra*, 429 U.S. at 261, since a program of reporting by defendant of available rentals and monitoring of such disclosure as the Court may deem appropriate will eliminate one obstacle to HOME's counselling and other programs which now exists—the secretive "steering" on the basis of race. HOME's standing therefore should be upheld by this Court.

IV.
CONCLUSION

For each of the foregoing reasons, defendants' motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum of Law in Opposition to Defendants' Motion to Dismiss was mailed postage prepaid to Richard W. Hogan, Hirschler, Fleischer, Weinberg, Cox & Allen, Second Floor Massey Building, Fourth and Main Streets, Richmond, Virginia 23241 on this 20th day of February, 1979.

/s/ JAMES F. STUTTS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, et al

v.

HAVENS REALTY CORPORATION, et al

Filed Feb. 22, 1979
Clerk, U. S. Dist. Court
Richmond, Va.
Civil Action No. 79-0024-R

ORDER

As is made clear by Local Rule 11(F) and (P), applications for extensions of time are granted by the Court, not by opposing counsel. Accordingly, the motion of plaintiffs Coleman, Willis, and Housing Opportunities Made Equal to reconsider, filed herein on 16 February 1979, is DENIED and the brief tendered on 20 February 1979, and mistakenly marked "filed" by the Clerk, will not be considered.

And it is so ORDERED.

Let the Clerk send a copy of this order to all counsel of record.

/s/ D. DORTCH WARRINER
United States District Judge

Date: 22 February 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, SYLVIA COLEMAN,
R. KENT WILLIS, and on behalf of all others
similarly situated, and
HOUSING OPPORTUNITIES MADE EQUAL,
a Virginia Corporation,

Plaintiffs,

v.

HAVENS REALTY CORPORATION,
a Virginia Corporation, and
ROSE JONES,

Defendants.

Filed Mar. 5, 1979
Clerk, U. S. Dist. Court
Richmond, Va.
Civil Action No. 79-0024-R

MOTION FOR ENTRY OF FINAL JUDGMENT

Plaintiffs Sylvia Coleman, R. Kent Willis and Housing Opportunities Made Equal, by counsel, move the Court pursuant to Rule 54(b) of the Federal Rules of Civil Procedure to enter final judgment on the defendants' Motion to Dismiss the claims of these plaintiffs. In support of their motion defendants show unto the Court the following:

1. By order dated and entered February 16, 1979, this Court dismissed the claims of these plaintiffs for failure to state a claim upon which relief may be granted.

2. In its Memorandum dated February 16, 1979, the Court reasoned that these plaintiffs lacked standing to institute this action and that certain of plaintiffs' claims under

the Fair Housing Act of 1968 are barred by the statute of limitations.

3. The issues of standing of various classes of plaintiffs in fair housing actions and the applicable time period for the running of the statute of limitations in actions alleging continued acts of racial discrimination have not been resolved uniformly among the Courts of Appeals. The issue of standing of tester plaintiffs awaits disposition this term by the United States Supreme Court in the case of *Village of Bellwood* v. *Gladstone Realtors*, 569 F.2d 1013 (7th Cir.), *cert. granted*, 46 U.S.L.W. 3765 (June 7, 1978).

4. These plaintiffs believe that an appeal on the issues of standing and the statute of limitations will not delay the present proceedings regarding the defendants' liability, nor prejudice the defendants in any way, and that in the interest of justice the Court of Appeals should be permitted to rule upon these issues.

WHEREFORE, the aforesaid plaintiffs move the Court to enter a final judgment as to these plaintiffs, noting that there is no just reason for delay of entry of final judgment.

SYLVIA COLEMAN,
R. KENT WILLIS,
and on behalf of all others
similarly situated, and
HOUSING OPPORTUNITIES MADE
EQUAL, a Virginia corporation

By /s/ JAMES F. STUTTS
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
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Defendants.

Filed Mar. 7, 1979
Clerk, U.S. Dist. Court
Richmond, Va.
Civil Action No. 79-0024-R

ORDER FOR FINAL JUDGMENT

On the prior Order of this Court, dated and entered February 16, 1979, it appearing to the Court that there is no just reason for delay in entering final judgment on Defendants' Motion to Dismiss the Claims of plaintiffs, Sylvia Coleman, R. Kent Willis and Housing Opportunities Made Equal it is, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

ORDERED that a final judgment be entered herein that the claims of these plaintiffs are dismissed.

/s/ D. DORTCH WARRINER
United States District Judge

Date: 6 March 1979

Seen:

/s/ RICHARD W. HOGAN
RICHARD W. HOGAN
Counsel for Defendants
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I ask for this:

/s/ JAMES F. STUTTS
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAUL ALLEN COLES, SYLVIA COLEMAN,
R. KENT WILLIS,
and on behalf of all others similarly situated, and
HOUSING OPPORTUNITIES MADE EQUAL,
a Virginia Corporation,

Plaintiffs,

v.

HAVENS REALTY CORPORATION,
a Virginia Corporation
and ROSE JONES,

Defendants.

Filed Mar. 15, 1979
Clerk, U.S. Dist. Court
Richmond, Va.
Civil Action No. 79-0024-R

NOTICE OF APPEAL

Notice is hereby given that Sylvia Coleman, R. Kent Willis, and Housing Opportunities Made Equal, hereby appeal to the United States Court of Appeals for the Fourth Circuit from the final judgment entered in this action dismissing the claims of these plaintiffs on the 6th day of March, 1979. An Order dismissing the claims of these plaintiffs was entered February 16, 1979.

SYLVIA COLEMAN,
R. KENT WILLIS,
HOUSING OPPORTUNITIES MADE EQUAL
By /s/ JAMES F. STUTTS
Counsel

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Richmond, Virginia 23219
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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1199

PAUL ALLEN COLES,

Plaintiff,

AND

SYLVIA COLEMAN, R. KENT WILLIS,
and on behalf of all other similarly situated,
and HOUSING OPPORTUNITIES MADE EQUAL,
a Virginia Corporation,

Appellants,

v.

HAVENS REALTY CORPORATION,
a Virginia Corporation, and ROSE JONES,

Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Virginia. D. Dortch Warriner, District Judge.

Argued: January 10, 1980 Decided: September 18, 1980

Before FIELD, Senior Circuit Judge, HALL and SPROUSE, Circuit Judges.

Vanessa Ruiz (Daniel M. Singer, Theodore C. Hirt, Dennis J. Riley, Fried, Frank, Harris, Shriver & Kampelman; James F. Stutts, McSweeney and Stutts on brief) for Appellants; Richard W. Hogan (Linda L. Royster, Hirschler, Fleischer, Weinberg, Cox & Allen on brief) for Appellees.

SPROUSE, Circuit Judge:

This is an appeal from a final judgment of the district court granting defendants' motion to dismiss an action involving allegations of "racial steering" and racial discrimination in the rental of housing accommodations in the City of Richmond and Henrico County, Virginia. "Racial steering" is a practice by which real estate brokers and agents preserve and encourage patterns of racial segregation by steering members of racial and ethnic groups to buildings occupied primarily by members of their own racial or ethnic group and away from buildings and neighborhoods inhabited by members of other races or groups.

This suit was brought under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601, 3604, 3612(a) (hereafter Fair Housing Act) and the Civil Rights Act of 1866, 42 U.S.C. § 1982. The district court dismissed all the claims except that of a single plaintiff, Paul Allen Coles. It held that the other claims were time-barred by the 180-day limitation period of the Fair Housing Act, and that the other plaintiffs lacked standing to assert discrimination claims under either statute. After a careful review of the law, we conclude that all plaintiffs have standing under the Fair Housing Act and that their claims are not time-barred. We therefore reverse and remand for further proceedings. We do not reach the questions of standing under 42 U.S.C. § 1982.

The corporate plaintiff in this action is Housing Oppor-

tunities Made Equal (HOME). HOME is a Virginia non-profit corporation with about 600 members created for the purpose of eliminating unlawful, discriminatory housing practices, thereby seeking to make equal opportunity in housing a reality in the Richmond Metropolitan Area. HOME activities include: assisting individuals of all races in obtaining housing in the metropolitan area through the operation of a housing counseling service; investigating allegations of discrimination and referring complaints to appropriate federal and state authorities; conducting independent investigations of real estate brokers located in the metropolitan area to determine whether housing is being made available without regard to race; and taking appropriate steps to eliminate any racial discriminatory housing practices it may have found to exist.

The three individual plaintiffs, a "renter" and two "testers", reside in the City of Richmond or Henrico County. Paul Allen Coles, a black person, unsuccessfully sought to rent housing accommodations from the defendants. The two "tester" plaintiffs, Sylvia Coleman, a black person, and R. Kent Willis, a white person, contacted defendants in regard to the availability of rental apartments in the course of their employment with HOME to determine whether defendants were practicing racial steering. Corporate defendant is Havens Realty Corporation (Havens), which is in the business of providing real estate brokerage services for rental apartment units in Richmond. The remaining defendant is Rose Jones, a Havens employee.

The factual allegations in the complaint must be accepted as true in the present posture of the case.[1] So construed, the complaint reflects the following facts relevant to the disposition of this appeal.

---

[1] *Warth v. Seldin*, 442 U.S. 490 (1975).

An unnamed black tester on March 14, 1978, inquired about rental vacancies at Havens and was told by Rose Jones that nothing was available. Later that day Willis, the white tester, asked about vacancies and was told by Jones that apartments were available at Colonial Court and Camelot Townhouse apartments. Colonial Court is integrated and Camelot Townhouse is predominately occupied by whites. A week later on March 21, 1978, black tester Sylvia Coleman asked generally about vacancies in apartments in Henrico County and was informed by one of defendant's employees that nothing was available, although the same day white tester R. Kent Willis was informed by Jones that there was an apartment at Colonial Court. Two days later, on March 23, 1978, black tester Coleman again asked Jones about vacancies and was told that nothing was available. White tester Willis was informed that day by Jones that an apartment was available at Colonial Court. On July 6, 1978, black tester Coleman asked specifically about Camelot Townhouse apartments and again received a negative response, but she was told about a vacancy at Colonial Apartments. That same day white tester John Barr, upon inquiry, was told an apartment was available at Camelot Townhouse apartments.

Coles visited defendant's offices on July 13, 1978, inquiring into the availability of apartments at Camelot Townhouses. He was informed there were no vacancies at Camelot but that an apartment was available in the adjoining integrated Colonial Court Apartment complex. The same day John Barr, a white tester, was informed by Rose Jones telephonically that an apartment was available at Camelot Townhouse—upon visiting the defendant's offices Barr was again informed that an apartment was available in the Camelot Townhouse.

The plaintiffs filed this action on January 9, 1979, individually and as a class action. The class included all persons who have rented or sought to rent residential property in Henrico County, Virginia, and who are adversely affected by the defendant's discriminatory acts, policies and practices. They seek declaratory and injunctive relief for the class, as well as an order requiring Havens to take various affirmative actions to overcome the effect of its past discriminatory actions. The individual plaintiffs in addition seek compensatory and punitive damages. HOME asks for its activity and litigation expenses.

Plaintiffs allege that the Richmond Metropolitan Area, including Henrico County, is racially segregated in its housing patterns; that is, it contains identifiable "white" and "black" neighborhoods; that the defendants' practices of racial steering contribute to the maintenance of existing neighborhood segregation and inhibit the development of stable, racially integrated neighborhoods; that defendants treat white and non-white prospective lessees differently based on their race or color; that defendants have engaged in practices to the detriment and injury of the plaintiffs and other similarly situated persons by consistently showing only prospective white customers rental units in buildings occupied primarily by white tenants, by consistently refusing or failing to show black prospective customers rental units in buildings occupied primarily by white tenants, and, on occasion, by failing or refusing to show prospective black customers rental units in less racially segregated buildings.

The complaint alleges that tester plaintiff Coleman (because of his race) and white tester Willis have been denied the right to rent real property in Henrico County and therefore have been deprived of the advantages and con-

veniences they would have enjoyed from living in this area, namely the right to the important social, professional, business, economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices.

It is also alleged that all the members of the class have been deprived of the right to the important social, professional, business, economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices, in violation of the Fair Housing Act.

The complaint alleges that HOME has had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices; and that HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices in violation of the Fair Housing Act.

STANDING

All plaintiffs have standing. Willis and Coleman have standing as testers but, even if this were not so, they have alleged sufficient personal harm to give them standing. HOME has Article III standing both as a representative of its members and on the basis of its allegations of harm to the corporation.

I.

TESTERS

The question of standing for testers under the Fair Housing Act was left unanswered by the Supreme Court in its

seminal pronouncement on Fair Housing Act standing in *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91 (1979). The involvement of Willis and Coleman and their treatment by the defendants, however, presents strong public policy reasons for resolving that question in favor of Fair Housing Act standing for bona fide testers. The basic appropriateness of affording them standing to litigate todays issues of fair housing parallels the importance of the right to litigate the crucial issues decided in *Pierson v. Ray,* 386 U.S. 547 (1967) and *Evers v. Dwyer,* 358 U.S. 202 (1958). There are, of course, distinctions in the cases but the binding similarity is that they all treat the right of testers to challenge actions frustrating vital public policy where in most instances no other effective challenge could be mounted. The testers in *Pierson* actively sought integrated admission to the "whites only" section of the bus station; in *Evers* they occupied seats in the forbidden section of the bus. While the testers here only inquired about apartment rentals and did not apply to rent an apartment, their actions serve the same fundamental purposes as the testers in *Pierson* and *Evers.* Willis and Coleman purposefully approached the defendants as the first step in eradicating racial discrimination in housing, a social evil so antithetical to a free and democratic society that Congress has devised special and sharp tools for its excision. Housing, as a personal choice right of a citizen, is no less important than other rights affecting human dignity, such as unfettered access to public facilities. In *Evers* the Court wrote per curiam:

> A resident of a municipality who cannot use transportation facilities therein without being subjected by statute to special disabilities necessarily has, we think, a substantial, immediate, and real interest in the validity of the statute which imposes the disability. (Citation

> omitted). That the appellant may have boarded this particular bus for the purpose of instituting this litigation is not significant. (Citations omitted).

Id. at 204.

In *Pierson* a group of clergymen traveled to Jackson, Mississippi for the sole purpose of testing their rights to unsegregated public accommodations. The Court said, "[t]he petitioners had the right to use the waiting room of the Jackson bus terminal, and their deliberate exercise of that right in a peaceful, orderly, and inoffensive manner does not disqualify them from seeking damages under § 1983." 386 U.S. at 558 (footnote omitted).

In *Pierson* and *Evers* the court said in effect that since the plaintiffs were not representing injuries to third parties but rather to themselves there was no issue of prudential limitations. Here Willis and Coleman, in their capacity as employed testers, unquestionably assert the rights of third parties. As explained in *Warth*[3] however, Congress eliminated prudential considerations in Fair Housing Act cases, intending that standing be allowed as broadly as constitutionally permitted by Article III. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972).

The breadth of Congressional protection against housing discrimination is apparent from the language of Section 3604(d), 42 U.S.C. § 3604(d) which makes it unlawful "[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." This prohibition against providing false information creates a concomitant right to receive correct

[3] *Id.* at 509-10.

housing information without regard to race or color. Individuals illegally denied housing by subterfuge are, by the nature of the wrongful act, less able than others in our society to require enforcement of the Civil Rights Act through private litigation as "private attorneys general". There is no rational reason why their bona fide surrogates cannot pursue their cause. If the defendants had supplied the testers truthful information—that apartments were available both in Colonial Apartments and Camelot Town-House Apartments—there would have been no injury and the social reform legislated by Congress would have been advanced without resort to the courts.

It is not necessary to formulate a general rule circumscribing standing for tester plaintiffs. Suffice it to say that they occupy a narrow island limited to areas fundamentally necessary for access to the federal courts as presented by *Pierson* and *Evers* or, as here, where Congress has recognized a simliar deeply-grounded human right. The legislative design of the Fair Housing Act provides such broad standing for enforcement of the right. This is consistent with the *Trafficante* and *Bellwood* interpretation of the Fair Housing Act—maintaining the prophylactic quality of Article III limitations while recognizing the elasticity necessary to accommodate constitutional Congressional intent.

II

DIRECT INJURY TO "TESTERS"

Coleman and Willis also alleged violations of their right to enjoy the fruits of an integrated community in much the same language as the individual plaintiffs in *Trafficante* and *Bellwood*. This similarity gives weight to their status as bona fide "testers". These allegations, moreover, are

sufficient to grant standing for each of them as individual plaintiffs.

The Supreme Court in *Warth*, discussing an alleged violation of 42 U.S.C. § 1981, stated:

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention. Absent the necessary allegations of demonstrable, particularized injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied."

Warth v. Seldin, 422 U.S. at 508.

The *Warth* opinion indicated a reservation as to whether the same ruling would have applied to a Fair Housing Act case.[3] *Trafficante* and *Bellwood* however decided standing under Fair Housing Act principles. Coleman and Willis both claim deprivation of community rights in language at least as specific as approved there. They are residents of Henrico County included within the Richmond Metropolitan area. They claim the practice of racial steering has adversely affected the area in which they live and that the defendants have engaged in racial steering. Black tester Coleman claims she has been denied the right to rent property and to make and enforce contracts for the lease of real estate in Henrico County by defendants' action; has been deprived of the advantages and conveniences she would have enjoyed from living in the area, and has been deprived of the right to the important social, professional, business, economic, political, and aesthetic benefits of in-

[3] *Id.* at 513 n. 21.

terracial associations that arise from living in integrated communities free from discriminatory housing practices. White tester Willis claims he has been deprived of the same rights afforded by integrated communities. Both Colemand and Willis claim they have been subjected to a "dual" housing market in Henrico County on the basis of race or color by defendants' practices.

Housing discrimination injuries are not inflicted so neatly that the wounded can always be identified as individuals, representatives of individuals, or members of a community. The Supreme Court's expressions on standing thus are not rigidly compartmentalized as governing exclusively those directly injured, testers, or members of the community.

In *Trafficante v. Metropolitan Life Insurance,* [sic] *Co.,* 409 U.S. 205, 208 (1972), one black and one white tenant of an apartment complex complained of discriminatory rental practices, alleging:

> (1) they had lost the social benefits of living in an integrated community; (2) they had missed business and professional advantages which would have accrued if they had lived with members of minority groups; (3) they had suffered embarrassment and economic damage in social, business, and professional activities from being "stigmatized" as residents of a "white ghetto". (Footnote omitted).

The Court held plaintiffs were persons "aggrieved" as defined in Section 810(a) of the Fair Housing Act, i.e., any person who claims to have been injured by a discriminatory housing practice. In this context Justice Douglas said:

> The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, "the whole

> community," 114 Cong. Rec. 2706, and as Senator Mondale who drafted § 810(a) said, the reach of the proposed law was to replace the ghettos "by truly integrated and balanced living patterns."

Id. at 211.

In *Bellwood* four white plaintiffs, who were residents of the target area of Bellwood, alleged that discriminatory housing practices deprived them of "the social and professional benefits of living in an integrated society." 441 U.S. at 111. The Court noted the allegation was similar to that in *Trafficante*, where it was held that the injury alleged was sufficient to satisfy the constitutional standing requirement of actual or threatened harm. The broad definition of "person aggrieved" under § 810 of the Fair Housing Act was considered a clear indication of Congressional intent to permit liberal standing. The Court considered this to be a part of the scheme of the Act to encourage enforcement by complaints from private persons or "private attorneys general" which are "the main generating force" in "vindicating a policy that Congress considered to be of the highest priority." The 'private attorneys general' role under the Civil Rights Act of 1968 serves not only to protect "those against whom a discrimination is directed but also those whose" daily lives are affected. *Trafficante, Id.* at 209 & 211.

We have neither the power nor the desire to minimize the "case and controversy" requirements of Article III. The modern decisions have not. The constitutional inquiry necessary in confining litigation to proper parties over appropriate disputes remains as generally stated in *Warth v. Seldin*, 422 U.S. 490, 498-99 (1974), *citing, Baker v. Carr*, 369 U.S. 186, 204 (1962)—"whether the plaintiff has 'alleged such a personal stake in the outcome of the

controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."

III

ORGANIZATIONAL STANDING

The plaintiff HOME claims its members have been deprived of community advantages by defendants' actions in the same language utilized by Coleman and Willis. HOME therefore has representational standing to litigate these claims on behalf of its members.[4] *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), summarizes the requirements of representational standing where the organizational plaintiff has not itself suffered injury:

> [W]e have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Id. at 343.

See also Warth v. Seldin, 422 U.S. at 511 wherein the Court said:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action

[4] It however can not represent its members in individual claims for damages where both the fact and extent of injury would require individualized proof. *Warth v. Seldin*, 422 U.S. at 511 & 515-16.

> of the sort that would make out a justiciable case had the members themselves brought suit.

Id. at 511.

The complaint also alleges sufficient injury to HOME as an entity to confer standing on it directly. It claims HOME has been frustrated in its efforts to assist equal access to housing through counseling and other referral services. HOME has devoted significant resources identifying and counteracting the defendants' racially discriminatory steering practices.

This is more than the protestations of general interest found to be insufficient for standing in *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *Warth v. Seldin, supra*, and by the court of appeals in *Bellwood*, 569 F.2d 1013, 1917 [sic] (1978). Although not equaling, it approaches the injury suffered by the nonprofit developer in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See also Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972); *Heights Community Congress v. Rosenblatt Realty, Inc.*, 73 F.R.D. 1 (N.D. Ohio 1975). In *Arlington Heights* the Court said:

> MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest. See *Sierra Club v. Morton, supra*, at 739. The specific project MHDC intends to build, whether or not it will generate profits, provides that "essential dimension of specificity" that informs judicial decisionmaking. *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221 (1974).

Id. at 263.

Although HOME's goals cannot be equated with bricks and mortar, they are functional, requiring identifiable action and the expenditure of effort and funds which may result in success or failure in achieving its objectives. Its "projects" therefore "provides that 'essential dimension of specificity' that informs judicial decision making," as described in *Arlington Heights.*

IV

THE TARGET AREA

The defendants in oral argument contended that the City of Richmond or Henrico County is too large[5] as a matter of law to comprise a "target area" of housing discrimination. The "target area" in *Trafficante* was an apartment complex of 8,200 tenants, while the population of Bellwood in which the target neighborhood was located was estimated at 20,969. *Gladstone, Realtors v. Bellwood, Id.* at 113 n. 27. As the Court said in *Bellwood,* however:

> The constitutional limits of respondents' standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks rather than apartment buildings. Rather, they are determined by the presence or absence of a "distinct and palpable injury," *Warth v. Seldin,* 422 U.S., at 501, to respondents resulting from petitioners' conduct. A "neighborhood" whose racial composition allegedly is being manipulated may be so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a par-

[5] The population of the City of Richmond is 219,883 while that of Henrico County, Virginia is 172,922. Department of Commerce, Bureau of Census, Current Population Reports, Special Census of the Richmond, Virginia areas, April 4, 1978, p. 1, published August, 1979.

> ticular resident. The presence of a genuine injury should be ascertainable on the basis of discrete facts presented at trial. (Footnote omitted).

Id. at 114.

The district court's dismissal prevented plaintiffs Coleman, Willis, and HOME from proceeding to trial. Since allegations bearing on standing must be actualized by proof, the defendants may, on remand, contest these as any other facts. The complaint in the instant case does not specifically allege that the discrimination practiced at Colonial Courts and Camelot Townhouse Apartments affect the area where the testers reside. The district court may require the complaint to be amended for such allegation necessary to facilitate production of evidence bearing on this issue. If the allegations are not supported by proof at trial, the case may be terminated for lack of standing at an appropriate stage of the trial. *Id.* at 115 n. 31.

V

STATUTE OF LIMITATION

The defendants contend and the district court held that all the alleged Fair Housing Act violations except the one of July 13, 1978, involving Coles are time-barred by the statute of limitation contained in 42 U.S.C. § 3612(a). The applicable part of that statute states simply: "a civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred."

It is conceded that each of the specific acts of the defendants except the one of July 13 transpired more than 180 days before the complaint was filed. The defendants contend that each discrete act constitutes an "occurrence" and an action is barred as to each specific act after 180 days. The

plaintiffs contend that the "occurrence" is the defendant's continuing practice of racial steering and that the 180 days commences with the last act—in this case the violation of July 13. We agree with the plaintiffs and hold that none of the allegations in the complaint are time-barred by the 180-day provision.

Hickman v. Fincher, 483 F.2d 855 (4th Cir. 1973), affirmed a district court ruling that barred an action commenced more than 180 days after the last act of discrimination. *Hickman*, however, is not dispositive because there was no allegation of a continuing violation or a pattern of violations.

There is an appealing simplicity equating "occurrence" to a discrete act. Not simple, however, are the social ills targeted by Congress nor the actions of putative landlords. It is not isolated instances of discrmination that are the primary focus of the statute—rather it is a generalized practice of housing discrimination.

The Court of Appeals for the Seventh Circuit considered a similar contention in *Baker v. F & F Investment*, 420 F.2d 1191 (7th Cir. 1970). Negro purchasers of real estate on installment contracts alleged they were burdened with discriminatory prices and terms. The defendants there argued that they had performed only a single action—the execution of the contract—and that this was time-barred. The court disagreed, holding the violations continued during the lives of the contracts:

> Plaintiffs have alleged wrongs committed by defendants which continue during the entire lives of the individual purchase contracts. They have alleged a conspiracy among defendants, the object of which was the establishment of a continuing relationship with individual plaintiffs. . . . Because of the continuing nature of the overt acts alleged, the statutes of limitations do

> not commence to run when the contracts were executed but when they terminate.
>
> . . . .
>
> [T]he touchstone of our inquiry must be the nature and extent of defendants' behavior, not the duration of plaintiff's injury.

Id. at 1200 (Citation omitted).

See Cedeck v. Hamiltonian Federal Savings & Loan Association, 551 F.2d 1136 (8th Cir. 1977) and *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973). See also *Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Service, Inc.*, 422 F.Supp. 1071, 1078 (D.N.J. 1976) where the New Jersey District Court said, in considering the § 3612(a) time limitation:

> Congress obviously included such a provision to prevent the district courts from being used to exhume stale grievances. No such considerations apply to the case at bar. Plaintiffs have alleged what amounts to a continuing conspiratorial practice on the part of multiple, influential defendants. Taking the complaint as true, as is required at this early juncture, plaintiffs' grievance is anything but stale. It is fresh and immediate.

See Stingley v. City of Lincoln Park, 429 F.Supp. 1379 (E.D. Mich. 1977).

The Sixth Circuit in *Hunter v. Atchinson*, 466 F.2d 490 (6th Cir. 1972), held that the facts of a given case would determine whether the language of § 3612(a) means the statute runs from the first or the last of the discriminatory acts. That opinion reversed the district court's dismissal and remanded for an evidentiary hearing noting "[t]his case may ultimately require us to construe the Congressional purpose involved in the limitation. . . ." *Id.* at 491.

There is no reason to differentiate the purpose of the § 3412(a) statute of limitation from general statutes barring litigation after a lapse of time. Lawmakers protect litigants from perpetual threats of lawsuits and protect the integrity of enlightened fact finding. These policies do not militate against our holding. The instant controversy was continuing—the evidence easily obtainable. It is not unfair to require these defendants to litigate the matter when they were, according to the complaint, acutely aware of their continuing activities. Coles, Coleman, Willis and HOME were involved in active, consecutive, connected, and continuing attempts to secure or determine compliance with the Fair Housing Act. The defendants, just as resolutely, continued their practice of prohibited discrimination against these specific individuals. This, under the circumstances, is a continued relationship between the defendants and the plaintiffs and a continued violation of § 3604 so that the violations continued to "occur" until the last act of July 13, 1978. By the very nature of these offenses, "occurrence" must be thus construed to effect the remedial purposes of the act.

Reversed and Remanded.

Office-Supreme Court, U.S.
FILED
FEB 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION and ROSE JONES,
Petitioners,

v.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Whether this Court should reconsider the unanimous decision of the Fourth Circuit that respondents have standing under the Fair Housing Act.

2. Whether this Court should reconsider the unanimous decision of the Fourth Circuit as to when an action must be commenced under the Fair Housing Act.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
REASONS FOR DENYING WRIT	6
I. THE GRANT OF A WRIT OF CERTIORARI TO REVIEW THE UNANIMOUS DECISION OF THE COURT BELOW WOULD NOT RESOLVE THE QUESTION WHETHER A "TESTER" HAS STANDING UNDER THE FAIR HOUSING ACT	6
II. THIS CASE DOES NOT RAISE IMPORTANT QUESTIONS CONCERNING STANDING UNDER THIS COURT'S DECISION IN *Trafficante* v. *Metropolitan Life Insurance Co.* And *Gladstone, Realtors* v. *Village Of Bellwood*	8
III. THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE FOURTH AND SEVENTH CIRCUITS CONCERNING AN ORGANIZATIONAL PLAINTIFF'S STANDING UNDER THE FAIR HOUSING ACT	10
IV. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND A DECISION OF THE THIRD CIRCUIT CONCERNING THE 180-DAY STATUTE OF LIMITATIONS ESTABLISHED BY SECTION 812 OF THE FAIR HOUSING ACT	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: PAGE

Evers v. *Dwyer*, 358 U.S. 202 (1958) 6, 7

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91 (1979) 5, 6, 7, 8, 9, 10

Hunt v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977) 11

Meyers v. *Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977) 12, 13, 14

Pierson v. *Ray*, 386 U.S. 547 (1967) 6, 7

Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) 7, 8, 9, 10

Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) 11

Village of Bellwood v. *Gladstone, Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors*, v. *Village of Bellwood*, 441 U.S. 91 (1979) 10

Warth v. *Seldin*, 422 U.S. 490 (1975) 11

STATUTES:

U.S. Const. art. III 6, 7

28 U.S.C. §1331 2

28 U.S.C. §1337 2

28 U.S.C. §1343(4) 2

28 U.S.C. §2201 2

Civil Rights Act of 1866, 42 U.S.C. §1982 2

Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* 13

Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.* 2

42 U.S.C. §3612(a) ..... ii, 2, 4, 5, 12

MISCELLANEOUS:

SUPREME COURT RULE 17.1 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-988

HAVENS REALTY CORPORATION and ROSE JONES,
Petitioners,

v.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Respondents respectfully pray that petitioners' request for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case be denied.

OPINIONS BELOW

Since the filing of the petition for a writ of certiorari, the opinion of the Court of Appeals has been reported at 633 F.2d 384 (4th Cir. 1980).

STATEMENT OF THE CASE

This litigation challenges petitioners' practice of "racial steering", a form of racial discrimination. Specifically, as alleged in the complaint, petitioners have preserved and encouraged racial segregation in the Richmond, Virginia metropolitan area by steering white applicants toward apartment buildings occupied primarily by white tenants and by steering black applicants away from apartment buildings inhabited primarily by white tenants. Petitioners' different treatment of white and black applicants on the basis of such applicants' race or color violates both the Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. §1982.

The complaint, which is reproduced in the Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. App.") at 27, was filed on January 9, 1979 in the United States District Court for the Eastern District of Virginia by Paul Allen Coles, Sylvia Coleman, R. Kent Willis and Housing Opportunities Made Equal ("HOME"). Named as defendants were Havens Realty Corporation ("Havens") and Rose Jones. The district court's jurisdiction was based upon 42 U.S.C. §3612(a) and 28 U.S.C. §§1331, 1337, 1343(4) and 2201.

The individual plaintiffs, all residents of the City of Richmond or Henrico County, Virginia, are members of a class composed of all persons who have rented or sought to rent residential property in the Richmond metropolitan area and who are adversely affected by the discriminatory acts, policies and practices of petitioners. HOME is a Virginia non-profit membership corporation whose purpose is to make equal housing opportunities a reality. To this end, HOME operates a counseling service

whereby people interested in residing in the Richmond metropolitan area can obtain advice on available housing. HOME also investigates discrimination complaints made by those who use its counseling services and conducts independent investigations of real estate brokers in the Richmond metropolitan area to determine whether they provide equal housing opportunities to customers. Respondents, Sylvia Coleman, a black woman, and R. Kent Willis, a white man, were full-time employees of HOME at all relevant times described in the complaint. (Pet. App. 28-30)

Petitioner Havens is a Virginia corporation engaged in providing real estate brokerage services for apartment rental units. Havens owns and manages Camelot Townhouses and Colonial Court Apartments in Henrico County, within the Richmond metropolitan area. Petitioner Rose Jones was, and to the best of respondents' knowledge still is, an employee of Havens. (Pet. App. 30)

The complaint alleged, *inter alia*, that respondents Coleman and Willis and the class they represent were, as a result of petitioners' unlawful practices, deprived of important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices. The complaint further alleged that petitioners' practice of racial steering has frustrated HOME's efforts to assist its members and other individuals obtain equal access to housing. The specific actions of petitioners which the Fourth Circuit found, if proved at a trial on the merits, would constitute racial discrimination in violation of the Fair Housing Act are set forth in the complaint (Pet. App. 31-34) and are summarized in the Fourth Circuit's opi-

nion. (Pet. App. 5-7) Since, in the present posture of this case, the factual allegations in the complaint must be accepted as true, the specific actions of petitioners which establish a pattern of racial discrimination are not repeated here.

On February 16, 1979, the district court, in response to petitioners' motion to dismiss, concluded that respondents' claims were barred by the 180-day statute of limitations established by 42 U.S.C. §3612(a). The district court also found that respondents lacked standing to pursue the matters alleged in the complaint and thus sustained petitioners' motion to dismiss. Each of the respondents filed a timely notice of appeal to the Fourth Circuit. The complaint of plaintiff Paul Allen Coles was not dismissed and Coles therefore was not an appellant in the proceeding below and is not a respondent in this Court. See Petition for Writ of Certiorari (hereinafter "Petition"), p.i.

On September 18, 1980, the Fourth Circuit unanimously reversed the district court and held instead: (1) Coleman and Willis have standing as testers to institute and prosecute the complaint; (2) even if Coleman and Willis do not have standing as testers, each has alleged sufficient personal harm to satisfy standing requirements; (3) HOME has standing both as a representative of its members and on the basis of alleged harm to HOME; and (4) none of the allegations in the complaint is time-barred by the 180-day provision contained in 42 U.S.C. §3612(a).

On December 16, 1980, Havens and Jones petitioned this Court to grant a writ of certiorari to review the decision of the Fourth Circuit. On January 7, 1981, respondents were granted an extension to February 17, 1981 in which to file this Brief in Opposition.

SUMMARY OF ARGUMENT

A unanimous panel of the United States Court of Appeals for the Fourth Circuit correctly held that respondents Willis and Coleman have standing as testers to challenge petitioners' practice of racial steering, a form of racial discrimination. The Fourth Circuit's conclusion does not warrant review by this Court because of the Fourth Circuit's attention to the particular facts of this case which made respondents bona fide testers. Moreover, the Fourth Circuit's alternative holding that, *even absent their tester status*, respondents alleged sufficient personal harm to grant them standing in their own right means that the question left unanswered by this Court in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), namely, whether a tester has standing to initiate litigation under the Fair Housing Act, will remain unresolved even if this Court agrees to review and decide this case.

The Fourth Circuit also unanimously and correctly held that the organizational plaintiff HOME had standing to litigate the claims set forth in the complaint both on behalf of its members and as a result of direct injury to itself. These conclusions do not warrant review by this Court.

The final ground advanced by the petitioners to justify the grant of the writ of certiorari is the alleged conflict between the Third and Fourth Circuits regarding the 180-day statute of limitations established by 42 U.S.C. §3612(a). Because the case relied upon by petitioners to establish a conflict did not, like the instant case, involve a continuing practice of discriminatory actions, the alleged conflict simply does not exist.

REASONS FOR DENYING WRIT

I. The Grant Of a Writ Of Certiorari To Review The Unanimous Decision Of The Court Below Would Not Resolve The Question Whether A "Tester" Has Standing Under The Fair Housing Act.

During 1978, respondent Willis, who is white, and respondent Coleman, who is black, contacted the defendants on several occasions to ascertain the availability of rental housing in the two apartment complexes owned by the defendant Havens. These inquiries were made in the course of respondents' employment by HOME and were designed to determine whether defendants were engaged in racial steering. The Court of Appeals concluded that, under these circumstances, the respondents have standing as "testers" to initiate a lawsuit under the Fair Housing Act challenging the defendants' practices.

In *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 111 (1979), this Court found it unnecessary to consider whether an individual had standing to sue under the Fair Housing Act based upon his or her status as a tester. The Fourth Circuit concluded in the instant case that respondents Willis and Coleman, as employees of HOME, were "bona fide testers" (Pet. App. 8) who "in their capacity as employed testers" (Pet. App. 9) had standing to "assert the rights of third parties." (*Ibid.*) In partially answering in the affirmative the question left unresolved in *Bellwood*, the Fourth Circuit relied upon this Court's decisions in *Pierson* v. *Ray*, 386 U.S. 547 (1967) and *Evers* v. *Dwyer*, 358 U.S. 202 (1958) for its conclusion that Coleman and Willis satisfied the requirements of standing contained in Article III of the United States Constitution.

In concluding that Coleman and Willis had standing under the Fair Housing Act, the Fourth Circuit did not find it "necessary to formulate a general rule circumscribing standing for the tester plaintiffs." (Pet. App. 10) Rather, the Fourth Circuit was content to note that Congress, as part of the process of eradicating racial discrimination in housing, "a social evil so antithetical to a free and democratic society that Congress has devised special and sharp tools for its excision," (Pet. App. 8) had intended standing under the Fair Housing Act to be as broad as permitted under Article III. (Pet. App. 9) *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. at 109; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). Thus, the Fourth Circuit held that bona fide testers, such as Coleman and Willis, "occupy a narrow island limited to areas fundamentally necessary for access to the federal courts as presented by *Pierson* or *Evers*, or, as here, where Congress has recognized a similar deeply-grounded human right." (Pet. App. 10)

One reason this Court found it unnecessary to decide in *Bellwood* whether testers have standing under the Fair Housing Act was that the plaintiffs in *Bellwood*, without regard to their status as testers, alleged sufficient injury to themselves to provide standing under the Fair Housing Act and Article III. Similarly, in the instant case, the Fourth Circuit found that the plaintiffs "Willis and Coleman have standing as testers but, *even if this were not so, they have alleged sufficient personal harm to give them standing.*" (Pet. App. 7 [emphasis added]) Thus, the same alternative holding which resulted in this Court's declining to resolve in *Bellwood* the question of tester standing will doubtless preclude this Court from deciding that issue in the instant case.

In sum, this case does not warrant this Court's review of the question of tester standing under the Fair Housing Act because: (1) respondents Willis and Coleman alleged sufficient personal harm to grant them standing to pursue the allegations set forth in the complaint without regard to their status as testers; (2) the Fourth Circuit's opinion only partially answers the question left unresolved in *Bellwood*; and (3) the decision of the court below was correct.

II. This Case Does Not Raise Important Questions Concerning Standing Under This Court's Decision In *Trafficante* v. *Metropolitan Life Insurance Co.* And *Gladstone, Realtors* v. *Village Of Bellwood.*

Petitioners request that this Court grant a writ of certiorari because "the Court of Appeals went far beyond this Court's prior decisions concerning standing under the Fair Housing Act in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), and *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972)." (Petition, p.14) In fact, the court below merely applied, in a correct and articulate manner, the holdings of *Bellwood* and *Trafficante* to the complaint filed by Willis and Coleman in the district court. (Pet. App. 10-14) Indeed, as the court below noted, the plaintiffs have alleged "violations of their right to enjoy the fruits of an integrated community in much the same language as the individual plantiffs in *Trafficante* and *Bellwood*" (Pet. App. 10) and claimed "deprivation of community rights [in language] at least as specific" as the allegations and claims approved in *Bellwood* and *Trafficante*. (Pet. App. 11)

The petitioners place particular reliance upon the fact that Coleman and Willis are residents of a larger geographical area than the plaintiffs in *Bellwood* or *Trafficante*. Significantly, the petitioners in *Bellwood* similarily attempted to distinguish *Trafficante* on the grounds that "there is a critical distinction between an apartment complex, even one as large as that in *Trafficante*, and a 12 by 13 block residential neighborhood." 441 U.S. at 113 (footnote omitted). This Court, while recognizing the factual distinctions between the communities involved in *Trafficante* and *Bellwood*, did not view these distinctions as relevant to the question of plaintiffs' standing:

> The constitutional limits of respondents' standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks [as was the case in *Bellwood*] rather than apartment buildings [as was the case in *Trafficante*]. Rather, they are determined by the presence or absence of a "distinct and palpable injury", *Warth* v. *Seldin*, 422 U.S. at 501, to respondents resulting from petitioners' conduct.

Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. at 114.

This Court in *Bellwood*, 441 U.S. at 115, the Fourth Circuit in the decision below (Pet. App. 16-17) and respondents all recognize that there is a distinction between the factual allegations necessary to confer standing and the proof necessary to support a finding of actual injury. All the Fourth Circuit concluded, and all respondents maintain, is that the complaint contains sufficient specificity of "distinct and palpable injury" to Willis and Coleman resulting from the unlawful discrimination practiced by petitioners to confer standing

under the Fair Housing Act and the opportunity to prove, at a trial on the merits, the extent of that injury.

This is not a case where the lower courts have misconstrued the prior opinions of this Court. Accordingly, this Court should not grant the writ of certiorari for the purpose of affirming the Fourth Circuit's decision and in the process re-affirming the holdings of *Bellwood* and *Trafficante*.

III. There Is No Conflict Between The Decisions Of The Fourth And Seventh Circuits Concerning An Organizational Plaintiff's Standing Under The Fair Housing Act.

The Fourth Circuit also concluded that the organizational plaintiff, HOME, alleged sufficient injury to itself so as to confer standing on HOME directly. In so holding, the court below distinguished the very decision of the Seventh Circuit which petitioners cite as creating a conflict, *Village of Bellwood* v. *Gladstone, Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), by finding that the injuries alleged by HOME were specific injuries rather than "the protestations of general interest found to be insufficient for standing in *Sierra Club* v. *Morton*, 405 U.S. 727 (1972) and *Warth* v. *Seldin, supra, and by the court of appeals in Bellwood*, 569 F.2d 1013, 1917 [sic] (1978)." (Pet. App. 15 [emphasis added])

Unlike the organizational plaintiff in *Bellwood*, HOME has alleged that it has been and continues to be engaged in counseling services and projects in fulfillment of its purpose, activities which are directly impeded and frustrated by petitioners' practice of racial steering. The Fourth Circuit, aware of this distinction, found that the

injuries alleged by HOME approached the injuries suffered by the non-profit developer granted standing in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). (Pet. App. 15)

As an alternative holding, the Fourth Circuit found that HOME's complaint satisfied the requirements of representational standing established by this Court in *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). (Pet. App. 14) Specifically, the court below found that HOME met the *Hunt* standards because: (1) HOME's members would, on the basis of the allegations set forth in the complaint, have standing to bring suit on their own behalf; (2) the interests HOME sought to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, required the participation of the individual members in the law suit. *Ibid; see also Warth* v. *Seldin*, 422 U.S. 490 (1975).

As was the case with the individual respondents, the Fourth Circuit found two independent grounds for granting HOME standing: (1) injury to HOME's members and (2) injury to HOME itself. Given this Court's recent pronouncements on organizational standing, a review by this Court of the Fourth Circuit's unanimous conclusion that HOME has standing in this case is not likely to provide any more meaningful guidance to the lower courts on how to resolve this issue than already exists. The factual question whether the Fourth Circuit correctly drew the line either (a) between "specific injuries" and "protestations of general interest" or (b) in its application of the *Hunt* standards to the complaint filed in the district court is certainly not worthy of this Court's consideration.

IV. There Is No Conflict Between The Decision Below And A Decision Of The Third Circuit Concerning The 180-Day Statute Of Limitations Established By Section 812 Of The Fair Housing Act.

Section 812 of the Fair Housing Act; 42 U.S.C. §3612(a), requires that "[a] civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." Although all but one of the specific acts evidencing petitioners' unlawful practices transpired more than 180 days before the complaint was filed, respondents maintain, and the court below determined (Pet. App. 17-20), that none of the allegations in the complaint is time-barred:

> Coleman, Willis and HOME were involved in active, consecutive, connected, and continuing attempts to secure or determine compliance with the Fair Housing Act. The defendants, just as resolutely, continued their practice of prohibited discrimination against these specific individuals. This, under the circumstances, is a continued relationship between the defendants and the plaintiffs and a continued violation of §3604 so that the violations continued to "occur" until the last act of July 13, 1978. By the very nature of these offenses, "occurrence" must be thus construed to effect the remedial purposes of the act.

(Pet. App. 20)

The petitioners now urge this Court to grant certiorari in order to resolve an alleged conflict between the decision of the court below and the Third Circuit's opinion in *Meyers* v. *Pennypack Woods Home Ownership Association*, 559 F.2d 894 (3d Cir. 1977), as to when an event occurs which gives rise to a cause of action under the Fair Housing Act. On this point, however, peti-

tioners can find no solace in *Meyers*. Indeed, in their Petition, petitioners note merely that in *Meyers* the Third Circuit "*appeared* to question whether or not the continuing violation rationale was appropriate under Title VIII." (Petition, p.21 [emphasis added])

The reason for petitioners' seeming lack of confidence in the *Meyers* precedent is readily apparent from a reading of the Third Circuit's opinion. In *Meyers* the plaintiff, some two and one-half years before the complaint was filed, asked the defendant to place his name on a waiting list to purchase a home in a residential community which was controlled by the defendant. The Third Circuit held that, in this situation, the 180-day statute of limitations began to run on the date the defendant refused to place Meyers' name on the waiting list. The Third Circuit acknowledged that employment discrimination cases dealing with an analogous statute of limitations period under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, have held that a discriminatory refusal to hire may constitute a continuing violation. "Those cases," the Third Circuit noted, "were class actions involving alleged patterns and practices of discrimination continuing to affect all members of the plaintiff class whereas the instant case [*Meyers*] concerns a discrete [single] act of alleged discrimination against the individual plaintiff." 559 F.2d at 899.

In the instant case, the Fourth Circuit, in holding that plaintiffs' allegations were not time-barred by the 180-day period, was careful to focus upon the particular factual circumstances which gave rise to the complaint. As the Fourth Circuit noted, the plaintiffs "were involved in active, consecutive, connected, and continuing attempts to secure or determine compliance with the Fair Housing Act" while the defendants "just as resolutely,

continued their practice of prohibited discrimination." (Pet. App. 20) Thus, the instant case like the employment discrimination cases — but unlike *Meyers* — involves "patterns and practices of discrimination continuing to affect all members of the plaintiff class." *Meyers*, 599 F.2d at 899. There is, therefore, every reason to believe the Third Circuit panel which decided *Meyers* would have decided the instant case in the same manner as the court below. In any event, no conflict among the circuits now exists.

CONCLUSION

Because this case does not present any of the special and important reasons enumerated in this Court's Rule 17.1 as a reason for granting the writ of certiorari, respondents urge that the petition be denied.

Respectfully submitted,

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OCTOBER TERM, 1980

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HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether Article III of the United States Constitution confers standing under the Fair Housing Act on an organizational plaintiff either based on the organization's general interest in equal housing opportunity and its efforts to further that interest, or as a representative of its members, in the absence of allegations sufficient to meet the requirements of *Hunt v. Washington Apple Advertising Commission,* 432 U.S. 333 (1977).

2. Whether Article III of the United States Constitution confers standing under the Fair Housing Act on a "tester" or surrogate for persons directly injured by alleged discrimination, absent any allegation of injury to the tester.

3. Whether Article III of the United States Constitution confers standing under the Fair Housing Act on a person who alleges that a defendant has deprived him of the benefits of interracial association but who fails to allege any facts supporting a causal nexus between the defendant's acts and that deprivation.

4. Whether the allegation of a continuing pattern of discrimination affects the determination of when the 180 day limitation period under the Fair Housing Act commences to run.

PARTIES IN THE COURT OF APPEALS

Paul Allen Coles, a plaintiff in the district court, was listed in the caption of the court of appeals as plaintiff, but not as appellant. There were no issues with respect to him in the court of appeals and he has no interest in the outcome of this proceeding. All other parties are named in the caption of the case in this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
SUMMARY OF THE ARGUMENT	9
ARGUMENT	11
I. HOME LACKS STANDING UNDER THE FAIR HOUSING ACT EITHER AS A REPRESENTATIVE OF ITS MEMBERS OR BASED ON ITS OWN INJURY.	11
A. HOME Lacks Standing As A Representative Of Its Members Because The Allegations Of The Complaint Do Not Permit The Conclusion That The Requirements of *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977) Are Satisfied.	11
B. HOME Lacks Standing Based On Its Own Injury Because Its Alleged Injury Is Merely The Natural Concomitant Of, And Inseparable From, Its Abstract Concern With Equal Opportunity In Housing.	18
II. THE INDIVIDUAL PLAINTIFFS LACK STANDING IN THEIR CAPACITY AS TESTERS BECAUSE THEY HAVE ALLEGED NO INJURY TO THEMSELVES IN THAT CAPACITY.	22

Page

III. THE INDIVIDUAL PLAINTIFFS LACK STANDING AS PERSONS DEPRIVED OF THE BENEFITS OF INTERRACIAL ASSOCIATION BECAUSE THEY HAVE NOT ALLEGED A SUFFICIENT CAUSAL NEXUS BETWEEN THEIR INJURY AND THE CHALLENGED ACTS OF THE DEFENDANTS. 26

IV. PLAINTIFFS CLAIMS UNDER THE FAIR HOUSING ACT ARE BARRED BY THE LIMITATION PERIOD IN SECTION 3612(A) BECAUSE THEY DID NOT COMMENCE THIS ACTION WITHIN 180 DAYS AFTER BEING FULLY APPRISED OF THE FACTS AND OF THEIR RIGHTS, IF ANY, UNDER THE ACT. 32

CONCLUSION 40

TABLE OF AUTHORITIES

	Page
CASES:	
Acha v. Beame, 531 F.2d 648 (2d Cir. 1976)	34
Aetna Life Insurance Company v. Haworth, 300 U.S. 227 (1937)	14
Associated General Contractors of North Dakota v. Otter Tail Power Company, 611 F.2d 684 (8th Cir. 1979)	15
Austin v. Reynolds Metals Co., 327 F. Supp. 1145 (E.D.Va. 1970)	34
Baker v. F & F Investment, 420 F.2d 1191 (7th Cir. 1970)	32
Burwell v. Eastern Air Lines, Inc., 394 F. Supp. 1361 (E.D.Va. 1975)	34
City of Chicago Heights v. Arquilla-DeHaan, Inc., No. 77-C-3305 (N.D. Ill., May 21, 1980)	22
Delaware State College v. Ricks, ____U.S.____, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980)	35,37, 39,40
Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	14,27
Evers v. Dwyer, 358 U.S. 202 (1958)	23,24
Flast v. Cohen, 392 U.S. 83 (1968)	14
General Foods Corporation v. Massachusetts Department of Public Health, No. 80-1502 (1st Cir., May 13, 1981)	15
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	13,14,17, 21,23,25, 26,31,35, 37
Heights Community Congress v. Hilltop Realty, Inc., No. C79-422 (N.D. Ohio, December 31, 1980)	24
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977)	8,9,11, 12,14,15, 16

	Page
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)	35
Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)	35
Kennan v. Pan American World Airways, Inc., 424 F. Supp. 721 (N.D.Cal. 1976)	34
Laird v. Tatum, 408 U.S. 1 (1972)	28
Linda R.S. v. Richard D., 410 U.S. 614 (1973)	14,22, 27,28
Local 194, Retail, Wholesale and Department Store Union v. Standard Brands, Inc., 540 F.2d 864 (7th Cir. 1976)	16
Marquez v. Omaha District Sales Office, 440 F.2d 1157 (8th Cir. 1971)	34
Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894 (3d Cir. 1977)	39
Mulqueeny v. National Commission on the Observance of International Women's Year, 1975, 549 F.2d 1115 (7th Cir. 1977)	22
National Collegiate Athletic Association v. Califano, 622 F.2d 1382 (10th Cir. 1980)	15
National Constructors Association v. National Electrical Contractors Association, Inc., 498 F. Supp. 510 (D.Md. 1980)	15
Occidental Life Insurance Co. v. Equal Employment Opportunity Commission, 432 U.S. 355 (1977)	37
O'Shea v. Littleton, 414 U.S. 488 (1974)	28
Pierson v. Ray, 386 U.S. 547 (1967)	23,24
Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)	18,19
Sherman Park Community Association v. Wauwatosa Realty Co., 486 F. Supp. 838 (E.D.Wis. 1980)	24
Sierra Club v. Morton, 405 U.S. 727 (1972)	9,18, 19,20
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	14,18,19, 24,25

	Page
Stingley v. City of Lincoln Park, 429 F. Supp. 1379 (E.D. Mich. 1977)	38
Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292 (M.D.N.C. 1970)	34
Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205 (1972)	13,23,26, 31,35,37
United Air Lines, Inc. v. Evans, 431 U.S. 533 (1977)	34,37,40
United States v. S.C.R.A.P., 412 U.S. 669 (1973)	22
Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977)	9,18
Village of Bellwood v. Dwayne Realty, 482 F. Supp. 1321 (N.D. Ill. 1979)	24
Village of Bellwood v. Gladstone Realtors, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds*, 441 U.S. 91 (1979)	21,24
Warth v. Seldin, 422 U.S. 490 (1975)	8,9,12, 14,18,22, 23,24,25, 27,28,29, 30,31
Williams v. Norfolk and Western Railway Co., 530 F.2d 539 (4th Cir. 1975)	34
CONSTITUTIONAL PROVISIONS:	
U.S. Const. art III	*passim*
STATUTES:	
28 U.S.C. § 1254(1)	
28 U.S.C. § 1331	5
28 U.S.C. § 1337	5
28 U.S.C. § 1343(4)	5
28 U.S.C. § 2201	5
The Civil Rights Act of 1866 (42 U.S.C. § 1982)	5,32
Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et *et seq.*)	32,34,36, 38,39,40

	Page
Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act, 42 U.S.C. §§3601 *et seq.*)	*passim*
42 U.S.C. § 3602	33
42 U.S.C. § 3604	
42 U.S.C. § 3612	5,11,32, 33,34,36, 37,39
42 U.S.C. § 3613	36
OTHER AUTHORITIES:	
The Continuing Violation Theory of Title VII After United Air Lines, Inc. v. Evans, 31 Hastings L. J. 929 (1980)	37
Continuing Violations in Private Suits Under Title VII of the Civil Rights Act of 1964, 32 Ark. L. Rev. 381 (1978)	37
Continuing Violations of Title VII: A Suggested Approach, 63 Minn. L. Rev. 119 (1978)	37
Jackson and Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 Geo. L. J. 811 (1979)	37
Note, *Associational Third-Party Standing and Federal Jurisdiction Under Hunt*, 64 Iowa L. Rev. 121 (1978)	11
Note, *Organizational Representation Suits: Labor Unions May Attack Employment Discrimination Without Having to Meet Rule 23 Requirements*, 53 Ind. L. J. 113 (1977)	16
Title VII and the Continuing Violation Theory: A Return to Congressional Intent, 47 Fordham L. Rev. 894 (1979)	37

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-988

HAVENS REALTY CORPORATION and
ROSE JONES,
Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit, which is reported at 633 F.2d 384 (4th Cir. 1980), appears in the Joint Appendix at App. 63-81. The opinion of the United States District Court for the Eastern District of Virginia is unreported. It appears in the Joint Appendix at App. 33-35.

JURISDICTION

The Court of Appeals for the Fourth Circuit entered judgment on September 11, 1980. The petition for certiorari was granted on April 20, 1981.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

THE STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article III, Section 2, Clause 1:

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

42 U.S.C. § 1982

§ 1982. Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 3604:

§ 3604. Discrimination in the sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

42 U.S.C. § 3612:

§ 3612. Enforcement by private persons

(a) Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the

Secretary of a State or local agancy are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(b) Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security

Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c)Injunctive relief and damages; limitation; court costs; attorney fees

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided,* That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

42 U.S.C. § 3613(a)

§ 3613. Enforcement by the Attorney General; issues of general public importance; civil action, Federal jurisdiction; complaint; preventive relief

(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

STATEMENT OF THE CASE

This case arose from the alleged practices of Havens Realty Corporation (hereafter "Havens") and one of its employees Rose Jones ("Jones"), in Henrico County, Virginia, a suburb of Richmond, Virginia. Havens is a Virginia corporation with its principal place of business at two apartment complexes, Camelot Townhouse Apartments and Colonial Court Apartments, which are located directly across the street from each other. They are owned and managed by Havens.

On January 9, 1979, Paul Allen Coles (Coles), Sylvia Coleman (Coleman), R. Kent Willis (Willis), and Housing Opportunities Made Equal (HOME) filed an action in the United States District Court for the Eastern District of Virginia, Richmond Division, alleging that the defendants had engaged in the practice of racial steering of prospective apartment renters, in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1982, and the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.* (the Fair Housing Act). The district court's jurisdiction was based on 42 U.S.C. § 3612(a) and 28 U.S.C. §§ 1331, 1337, 1343(4) and 2201. The Complaint sought declaratory and injunctive relief, compensatory and punitive damages, and

costs and attorney's fees. The individual plaintiffs purported to represent a class composed of all persons who have rented or sought to rent property in Henrico County, Virginia, and who have been or continue to be, adversely affected by the acts, policies, and practices of Havens.

The Complaint, which is included in the Joint Appendix (App. 11-20), characterizes Coles, a black man, as a "renter plaintiff." The expression "renter plaintiff" means that Coles sought housing information from Havens and was ready, willing, and able to sign an apartment lease with Havens. This concept of "renter plaintiff" contrasts with the characterization of the other two individual plaintiffs. Coleman, a black woman, and Willis, a white man, were not actually seeking housing information for their own purposes, nor were they ready, willing and able to execute a lease. Instead, as the Complaint alleges, they "consulted [Havens and Jones] with regard to available rentals in the course of their employment with Housing Opportunities Made Equal to determine whether or not [Havens and Jones] have practiced racial steering in the rental housing market" (App. 13).

The organizational plaintiff, HOME, is a Virginia non-profit corporation, with its principal place of business in Richmond, Virginia. HOME's purpose, the Complaint states, is "to make equal opportunity in housing a reality in the Richmond Metropolitan Area" (App. 13). The Complaint alleges that HOME has a multi-racial membership of approximately 600 people, but it fails to allege where any of its members reside or any additional facts concerning HOME's members. HOME's goals are alleged to include the elimination of unlawful racially discriminatory housing practices that cause injury to its members, to all persons who seek apartment units in the Richmond Metropolitan Area and to all persons who reside in the Richmond Metropolitan Area (App. 13). It is alleged that HOME seeks to assure all such persons the right to the important social, professional, business, economic and political benefits of interracial associations that arise from living in integrated communities (App. 13). Finally, the Complaint states that HOME's activities include: (1) seeking to assist and

aid individuals of all races in obtaining housing in the Richmond Metropolitan Area through the operation of a housing counseling service, (2) investigation of allegations of discrimination and the referral of complaints to appropriate state and federal agencies, and (3) independent investigations of real estate brokers located in the Richmond Metropolitan Area (App. 13-14).

The Complaint makes both general and specific allegations against the defendants. The Complaint alleges generally that the defendants treat differently white and non-white prospective lessees on the basis of race by showing white customers rental units in buildings occupied primarily by white tenants, by failing to show such units to black customers, and by showing black customers units in buildings occupied primarily by black tenants. More specifically, the Complaint identifies five distinct instances of alleged steering by the defendants. The only instance involving the renter plaintiff, Coles, occurred on July 13, 1978, or 180 days prior to the filing of the Complaint. All other instances involved either non-party testers or the tester plaintiffs, Coleman and Willis, and all of these occurred more than 180 days prior to the filing of the Complaint.

On January 31, 1979, the defendants filed a motion to dismiss stating, among other things, that (1) all claims asserted under the Fair Housing Act were time barred and should be dismissed, except the claim arising on July 13, 1978, and that (2) HOME, Coleman, and Willis lacked standing to assert claims under the Fair Housing Act of 1968 and the Civil Rights Act of 1866 (App. 21). On February 16, 1979, the district court sustained the defendants' motion to dismiss on both grounds (App. 32). A timely notice of appeal was filed by HOME, Coleman and Willis (App. 61).

On September 18, 1980, the Fourth Circuit reversed the decision of the district court (App. 63-81). The court of appeals held that Coleman's and Willis' mere status as testers was sufficient to confer standing under the Fair Housing Act. The court of appeals further held, in the alternative, that Coleman and Willis had standing in their individual capacity (as opposed to their capacity as testers) because they had

alleged specific injury by averring that the defendants' conduct had deprived them of the right to "important social, professional, business and economic, political and aesthetic benefits of interracial association that arise from living in integrated communities free from discriminatory housing practices. . . ." (App. 17). The Fourth Circuit found that this allegation alone was sufficient to confer standing, even though the court acknowledged, "[t]he complaint in the instant case does not specifically allege that the discrimination practiced [by Havens] affect [*sic*] the area where the testers reside" (App. 78). In so holding, the court of appeals expressly declined to formulate any general rule circumscribing standing for tester plaintiffs (App. 71).

In practical effect, the Fourth Circuit's holding concerning the standing of Coleman and Willis gives standing to them both in their status as individual residents of the entire Richmond Metropolitan Area (an area undefined in the Complaint) and in their status as testers, regardless of whether or not they are residents of the Richmond Metropolitan Area.

With regard to the standing of HOME, the court of appeals held that, insofar as its members had been deprived of the same "community advantages" denied to Coleman and Willis by the actions of the defendants, HOME has representational standing to litigate these claims on behalf of its members, relying upon the requirements for representational standing set forth in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977) and *Warth v. Seldin*, 422 U.S. 490 (1975) (App. 75-76). The question of representational standing was neither briefed nor argued by HOME in the Fourth Circuit.

The Fourth Circuit also held that the Complaint alleged sufficient injury to HOME as an entity to confer standing on it in its own right, in addition to its standing as the representative of its members. Here, the Fourth Circuit held that HOME had standing because it had been frustrated in its efforts to assist equal access to housing through its counseling and referral services, and because it had devoted significant resources to identifying and counteracting the defendants' discriminatory steering practices (App. 76). The court of appeals held that

HOME's interest was more than the protestation of general interest found to be insufficient for standing in *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *Warth* v. *Seldin*, 422 U.S. 490 (1975), although less than the injury suffered by the non-profit developer in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In so doing, the Fourth Circuit stated that HOME's goals were "functional," and that its "projects" provided " 'the essential dimension of specificity' that informs judicial decision making," as described in *Arlington Heights* (App. 76-77). However, the Fourth Circuit failed to offer any reasons to justify its conclusion that HOME had more than the generalized interest that was insufficient to confer standing in *Sierra Club v. Morton* and *Warth v. Seldin.*

With regard to the statute of limitations, the Fourth Circuit held that the plaintiffs could base their Fair Housing Act claims upon acts occurring outside the applicable 180 day limitation period because the Complaint alleged that the actions of the defendants constituted a continuing violation (App. 81). The court of appeals based this conclusion on the general proposition that the primary focus of the statute is not on isolated instances of discrimination, but rather on the generalized practice of housing discrimination.

SUMMARY OF THE ARGUMENT

I.

HOME does not have standing either as a representative of its members or based on its own injury. Because the Complaint alleges virtually nothing about HOME's members, it is impossible to conclude that the requirements of *Warth v. Seldin*, 422 U.S. 490, 511 (1975), and *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977), are satisfied. In particular, it cannot be determined whether any HOME member has standing or whether the participation of individual members in the lawsuit is required. None of the policy reasons which normally justify representational standing, such as promoting judicial economy, are present.

Furthermore, HOME has not alleged a distinct and palpable injury to itself. Although HOME alleges that it is "frustrated" in its efforts to achieve equal opportunity in housing and has spent money to "identify and counteract" the defendants' alleged discrimination, these do not amount to injuries separate from its abstract concern with the problem of housing discrimination, and do not amount to judicially cognizable injuries under Article III.

II.

The Fourth Cirucit held that the individual plaintiffs had standing, solely in their capacity as "testers" for a fair housing organization, to maintain an action under the Fair Housing Act against the defendants, notwithstanding the fact that the individual plaintiffs did not allege any injury to themselves in their capacity as testers. The Fourth Circuit's holding, therefore, has totally eliminated the element of harm or injury to the plaintiff as a standing requirement mandated by Article III. This is contrary to any decision of this Court, or of any other federal court, concerning the minimum requirements of Article III.

III.

The Fourth Circuit held that the individual plaintiffs also had standing in their individual capacities because they alleged that they, as residents of either the City of Richmond or the County of Henrico, Virginia (an area consisting of over 400,000 people) had been deprived of the benefits of interracial association. The Complaint does not establish any causal nexus between the act complained of and the deprivation of the benefits of interracial association. In fact, the Complaint plainly states that the racially segregated housing patterns in Richmond, Virginia, are due to the actions of non-parties to this case, to restrictive covenants, zoning, and other factors. There are no concrete facts alleged from which it could possibly be inferred that, absent the defendants' alleged acts, there is a substantial probability that the individual plaintiffs would not

be denied the benefits of interracial association. Due to the total absence of a causal nexus between act and injury, the individual plaintiffs lack standing.

IV.

Plaintiffs Coleman, Willis and HOME engaged in "testing" Havens' compliance with the Fair Housing Act in March and on July 6, 1978. Being fully apprised of the facts and their rights, if any, under the Fair Housing Act, they nonetheless sat on those rights and did not file this action until more than 180 days after these acts. The 180-day limitation period began to run on the date of these tests, and had run when the present action was filed. The allegation of a continuing pattern of discrimination does not alter this fact, since (1) the mandatory limitation period of Section 3612(a) applies despite such allegations, and (2) the acts of discrimination alleged in this case do not constitute a continuing violation in any event.

I. HOME LACKS STANDING UNDER THE FAIR HOUSING ACT EITHER AS REPRESENTATIVE OF ITS MEMBERS OR BASED ON ITS OWN INJURY.

A. HOME Lacks Standing As A Representative Of Its Members Because The Allegations Of The Complaint Do Not Permit The Conclusion That The Requirements Of *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), Are Satisfied.

Although respondents neither briefed not argued the question of HOME's asserted representational standing,[1] the Court of Appeals for the Fourth Circuit held that HOME did have standing as a representative of its members. According to the

[1] The term "representational standing," also called associational third-party standing, Note, *Associational Third-Party Standing and Federal Jurisdiction Under Hunt*, 64 Iowa L. Rev. 121 (1978), will be used to denote HOME's asserted standing to represent the rights of its injured members, as compared with its asserted standing based on its own alleged injury which is discussed in the next section.

court, "[t]he plaintiff, HOME, claims its members have been deprived of community advantages by defendants' actions in the same language utilized by Coleman and Willis [the individual plaintiffs]. HOME therefore has representational standing to litigate these claims on behalf of its members" (App. 75 footnote omitted).[2] The court of appeals made no attempt to justify this conclusion, but instead merely recited the requirements for representational standing as outlined in *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (hereafter *"Warth"*), and further detailed in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977) (hereafter *"Hunt"*). Having identified the proper test for representational standing, the Fourth Circuit failed to apply that test to the facts of this case.

The requirements for representational standing specified in *Warth* and *Hunt* are clear:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members .... The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy .... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit .... So long as this can be established, and so long as the nature of the claim and the relief sought does not make individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Warth v. Seldin, 422 U.S. at 511. In *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977), this Court specified a more concrete test for representational standing:

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[2] All references to pages numbered "App." are to the Joint Appendix.

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members.

Id. A cursory examination of the Complaint (App. 11-20) demonstrates that these requirements are not satisfied.

Paragraphs 8 (App. 13) and 16 (App. 17-18) of the Complaint are the only allegations which refer to HOME's members. Paragraph 8 states that HOME's "membership is multi-racial and includes approximately 600 individuals" (App. 13). Paragraph 16 states:

> HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices, in violation of the Fair Housing Act of 1968, 42 U.S.C. § 3601, *et seq.*. [*sic*]

(App. 17-18).

It is impossible to conclude from these conclusory allegations that a single HOME member would have standing to sue in his or her own right. Not one member is alleged to be a resident of *any* area affected by the defendants' allegedly discriminatory practice, whether the relevant area is defined as an apartment complex, *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972) (hereafter "*Trafficante*"), a neighborhood, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) (hereafter "*Bellwood*"), or any other area. No clue is provided about who these 600 multi-racial members are, where they reside, work or recreate, or what kind of business, social, political or other ties they might have that could conceivably link them to the challenged acts. In other words,

the Complaint does not allege a causal connection between the alleged injury to HOME's members and the challenged act. Assuming that the deprivation of the benefits of interracial association, without more, is a sufficiently concrete and particularized injury, basic constitutional principles require that the Complaint allege a plausible causal connection between the injury and the defendants' alleged violation. *Warth*, 422 U.S. at 505-506, 509; *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); *Linda R.S. v. Richard D.*, 410 U.S. 614, 618-619 (1973).

This requirement of a causal connection between the defendants' conduct and the injury to the plaintiff, of course, is fundamental to the concept of justiciability, since a justiciable controversy does not exist if a court cannot award relief for illegal conduct that is substantially likely to ameliorate the harm allegedly suffered by the plaintiff. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 75 n.20 (1978); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 43 and 44-45 (1976). Without such a causal nexus, no "case or controversy" is presented, since one of the basic requirements of Article III, U.S. CONST. art. III, is that the exercise of judicial power not be gratuitous. *Bellwood*, 441 U.S. at 99; *Aetna Life Insurance Company v. Haworth*, 300 U.S. 227, 240-241 (1937). The questions presented are not capable of resolution through the judicial process unless the court can ascertain that relief ordered against the defendant will redound to the benefit of the plaintiff. As this Court reaffirmed in *Flast v. Cohen*, 392 U.S. 83, 95 (1968), Article III "limit[s] the business of federal courts to questions presented . . . in form historically viewed as capable of resolution through the judicial process." There can be no "resolution through the judicial process" if the results of that process do not affect the plaintiff.

Furthermore, since the Complaint provides virtually no information concerning HOME's members, it is similarly impossible to conclude that the third element of the *Hunt* test, concerning participation of individual members, is satisfied. Critical to determining whether the participation of individual members is required are two subsidiary questions: (1) whether the association is a suitable representative of its members, *see*

e.g. National Collegiate Athletic Association v. Califano, 622 F.2d 1382 (10th Cir. 1980), and (2) whether the interests of the association's members are too diverse to be represented by the association, *see e.g. Associated General Contractors of North Dakota v. Otter Tail Power Company*, 611 F.2d 684, 691 (8th Cir. 1979); *National Constructors Association v. National Electrical Contractors Association, Inc.*, 498 F. Supp. 510, 521 (D.Md. 1980).

Because of the possible *res judicata* effects of a judgment in an action in which an association maintains standing as a representative of its members, it is particularly important to determine, as part of the third element of the *Hunt* test, whether the association is in fact a suitable representative of its members. Although this Court has not yet addressed the extent to which an association's members are bound by the judgment when an association has represented them in litigation, the United States Court of Appeals for the First Circuit recently held that such a judgment precluded the subsequent assertion of similar claims by a member. *General Foods Corporation v. Massachusetts Department of Public Health*, No. 80-1502 (1st Cir., May 13, 1981). Thus, representational standing holds a potential for serious prejudice to the rights of the association's members. This potential mandates consideration by the court of the appropriateness of the association's representation and the authority by which that representation is undertaken. Unable to inquire into HOME's suitability as a representative of its members because of the virtual absence of information concerning the members, the Fourth Circuit Court of Appeals simply ignored this issue.

The court of appeals in the instant case also ignored any possible diversity of interests among HOME's members. In the case at bar, the controversial and conflicting nature of the relief requested indicates that there may well be many HOME members who favor the equal housing opportunity goals espoused by HOME (App.13), but not the affirmative steering

requested in HOME's prayer for relief (App.19).[3] The court of appeals erred in finding that HOME had standing to represent its members without first determining whether there was such diversity of interests among HOME's members that their individual participation in the suit was required.

Unlike the situation in the *Hunt* case, recognizing HOME's standing in this case would not serve the policies normally served by representational standing. Representational standing in a case such as *Hunt* might be justified because it serves to promote judicial economy with no apparent detriment to that concrete adverseness required to satisfy the case or controversy requirements of Article III. Thus, in *Hunt*, where each of the apple growers and dealers supporting the Washington State Apple Advertising Commission could, and probably would, have enforced their own rights in separate actions, based on their own particularized injury, no rational reason appears for prohibiting the organization from bringing one action as a representative of all its members. In this sense, representational standing is analogous to a class action under Rule 23 of the Federal Rules of Civil Procedure.[4] The members are protected from possible multiple conflicting judgments, the defendant is protected from the burden of multiple actions, and overburdened courts are similarly protected from the threat to judicial integrity resulting from conflicting judgments and from the burden of multiple actions.

When an association does not represent its members' rights, but rather represents its member's rights to represent the rights of others, similar considerations are not present. HOME's members, who HOME asserts have been deprived of

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[3] In this respect, it should be noted that HOME's prayer for relief requests an injunction *against* Havens' steering on account of race in showing apartments (App.19, ¶(b)(ii)) and an injunction *requiring* Havens' use of race to affirmatively steer whites to predominantly black "communities" and vice versa (App.19, ¶(c)(1)).

[4] *See* Note *Organizational Representation Suits: Labor Unions May Attack Employment Discrimination Without Having to Meet Rule 23 Requirements*, 53 Ind. L. J. 113 (1977), discussing *Local 194, Retail, Wholesale and Department Store Union v. Standard Brands, Inc.*, 540 F.2d 864 (7th Cir. 1976).

the benefits of interracial association, have standing only to assert the rights of those who are the direct objects of discrimination. *Bellwood,* 441 U.S. at 103 n.9. Under these circumstances, rather than promoting judicial economy, granting representational standing to associations such as HOME does not assure that one lawsuit will determine all rights against the defendants, since an action by an association, as a representative of members who represent the rights of others, does not bind those whose rights to equal housing opportunity the association gratuitously seeks to enforce. Furthermore, it does not protect those actually injured from multiple conflicting judgments, and it does not protect the defendants from multiple actions.

In considering whether Home has representational standing, it is important to note the implications in terms of the *jus tertii* doctrine. Representational standing is itself a *jus tertii* concept since the organization is asserting the rights of its members. If HOME's representational standing is upheld, HOME will be asserting the rights of its members to assert the rights of others. Although there can no longer be any doubt that a plaintiff who has sustained discrete and palpable injury can assert the rights of others under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, it is stretching Article III limits to the breaking point to suggest that a case or controversy is presented when a party which is not directly injured litigates on behalf of members who are not directly injured in order to enforce the rights of absent persons to equal housing opportunity. This kind of "double *jus tertii,*" in which the plaintiff is twice removed from the alleged act of the defendant, would make a mockery of the Article III requirement that there be a case or controversy *between the litigants.*

Clearly, the Fourth Circuit erred in ignoring the requirements of representational standing and in permitting representational standing to an organization when the beneficial purposes of representational standing are not furthered. The Fourth Circuit's decision should be reversed.

B. HOME Lacks Standing Based On Its Own Injury Because Its Alleged Injury Is Merely The Natural Concomitant Of And Inseparable From Its Abstract Concern With Equal Opportunity In Housing.

When injury to an organization is alleged as the basis for its standing, the question as always is whether or not the organization has suffered "a distinct and palpable injury" to itself which is substantially likely to be redressed by the requested relief. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 261-2 (1977) (hereafter "*Arlington Heights*"). Furthermore, when a plaintiff alleges that the injury results indirectly from an invasion of the rights of others, the burden of demonstrating that the organization meets Article III requirements is very difficult to meet. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44-45 (1976) (hereafter "*Welfare Rights*"); *Warth*, 422 U.S. at 505. Thus, where the injury results, or may result, not from the allegedly illegal act of the defendant but from the independent act of persons not before the court, as in *Welfare Rights*, or where effective realization of the relief requires the independent act of persons not before the court, as in *Warth*, the plaintiff does not have standing. Finally, an interest in or concern with an issue is insufficient to establish standing to litigate that issue. *Welfare Rights*, 426 U.S. at 39-40; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 225-226 (1974) (hereafter "*Reservists*"); *Sierra Club v. Morton*, 405 U.S. 727 (1972) (hereafter "*Sierra Club*").

In the instant case, HOME has asserted an interest in equal opportunity in housing, stating that "[i]ts purpose is to make equal opportunity in housing a reality in the Richmond Metropolitan Area" (App.13) and that "[i]ts goals include the elimination of unlawful racially discriminatory housing practices that cause injury to its members, to all persons who seek to rent apartment units in the Metropolitan Area and to all persons who reside in the Metropolitan Area" (App.13). In its effort to achieve these goals, HOME engages in certain activities, which include "seeking to assist and aid" persons seeking housing and investigating discrimination (App.13-14).

Unquestionably, HOME's standing cannot be grounded in its purpose and goals, which are the basis for its interest in the problem of housing discrimination and in this litigation. This conclusion is mandated by *Welfare Rights*, a case in which five organizations "dedicated to promoting access of the poor to health services," 426 U.S. at 39-40, did not have standing. In that case, this Court stated:

> Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the conrete injury required by Article III .... Insofar as these organizations seek standing based on their special interest in the health problems of the poor their complaint must fail.

Id. Similarly, in *Sierra Club*, the clear and long-standing interest of the club in environmental matters in general and the Sierra Nevada Mountains in particular did not confer standing. *Sierra Club*, 405 U.S. at 734-736. *Cf. Reservists*, 418 U.S. at 220-221, 225-226.

The question raised by the case at bar, however, is whether HOME has alleged a distinct and palpable injury in addition to or as distinct from its general interest in the elimination of housing discrimination. The Fourth Circuit Court of Appeals erroneously held that it had. An examination of HOME's asserted injury demonstrates that it is indistinguishable from the injury asserted by the Sierra Club and the organizational plaintiffs in *Welfare Rights*. In the Complaint, HOME alleges:

> 16. Plaintiff HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices.

(App.17). These "injuries" asserted by HOME in fact constitute no more than the pursuit of their interest in combating housing discrimination, and for this reason their allegations do

not meet the requirements of Article III. To suggest that HOME not only *has* an interest in fair housing, which is unquestionably insufficient, but also seeks to *further* its interests and is frustrated in its efforts, does not raise HOME above the level of the Sierra Club in *Sierra Club v. Morton*. The expenditure of funds in its efforts to achieve its goals is merely a natural concomitant of those goals. No doubt every special interest group expends money or conducts activities in furtherance of its interests, but HOME cannot acquire self-conferred standing by voluntarily expending funds. The Sierra Club, for example, also alleged that it engaged in "activities and conduct" in furtherance of its interests, *Sierra Club*, 405 U.S. at 735 n.8, a fact which is readily apparent from the organization's maintenance of the suit. Clearly, expenditure of money and effort in pursuit of its goals does not distinguish a special interest group from a plaintiff with cognizable injury.

An examination of an organization's alleged injury in a practical, common-sense way is necessary in order to determine whether or not the injury is a pretext designed to circumvent the constitutional standing limitations requiring a case or controversy between the litigants. HOME is organized because of the existence of housing discrimination and for the purpose of eliminating it. To suggest that the very existence of housing discrimination also results in cognizable injury for standing purposes is to conclude that *any* organization with an interest in *any* problem, organized because of the problem, is similarly injured by the existence of the problem itself. An association could be organized to eliminate employment discrimination, provide job counseling, and sue every employer it thought was discriminating, alleging that its efforts to eliminate employment discrimination were "frustrated" by the existence of that discrimination and that it had to spend money to combat that discrimination. Another association could be organized to eliminate discrimination in granting credit, provide credit counseling, and sue every financial institution it thought was discriminating, making the same allegations as HOME. Indeed, the same bootstrapping used by HOME could be used by individuals. Merely by declaring an ideological interest in a problem, and spending money or effort to further that interest,

the individual would, according to HOME, have met the minimum standing requirements of Article III. Clearly, the Article III requirement of a case or controversy between the parties is not satisfied by ideologically motivated plaintiffs such as HOME whose alleged injuries amount to no more than bootstrapping. The simple fact is that HOME is an organization having nothing more than an abstract concern with housing discrimination. No matter how well-intentioned, abstract concern with a problem does not confer standing.

Two lower courts have considered the question whether an organization has standing when it asserts as an injury the hampering of its objectives or the expenditure of funds to achieve its goals. In *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the Seventh Circuit discussed the standing of an organization similar to HOME called the Leadership Council for Metropolitan Open Communities.[5] The Council alleged precisely the same injury alleged by HOME in this case, namely that it was "devoted to eliminating housing discrimination... [and] that the racial steering attacked here 'hamper[s] and interfere[s]' with the Council's mission and 'cost[s] [it] money' to investigate and attempt to eliminate the practice." *Id.* at 1015 (brackets in original). The court denied standing, pointing out that the alleged "injury" was so inextricably intertwined with the assertion of the Council's interest as to be inseparable for Article III purposes. The court stated:

> [T]he Council's interest in open housing matters and its asserted commitment to effectuating that interest, albeit commendable, do not substitute for the concrete injury constitutionally required to invoke the jurisdiction of the federal courts .... The alleged dollar cost to the Council of attacking defendants' alleged practice is simply "concomitant to [its] keen concern" about open housing issues, and does not present independently cognizable injury.

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[5] This question was not raised on appeal to this Court. *Gladstone, Realtors v. Bellwood*, 441 U.S. at 98, n.5.

Id. at 1017 (second brackets in original). *Accord Mulqueeny v. National Commission on the Observance of International Women's Year, 1975*, 549 F.2d 1115, 1121 (7th Cir. 1977); *City of Chicago Heights v. Arquilla-DeHaan Realtors, Inc.*, No. 77-C-3305 (N.D. Ill., May 21, 1980). Finding no injury for Article III purposes, the circuit court dismissed the Council.

The reasoning of the Seventh Circuit in *Bellwood* applies squarely to HOME in the case at bar. HOME's allegations indicate that it is precisely the kind of ideological plaintiff that does not have standing under the limitations imposed by the Constitution. HOME seeks to use this lawsuit as "a vehicle for the vindication of value interests of concerned bystanders," *United States v. S.C.R.A.P.*, 412 U.S. 669, 687 (1973), thereby requesting what can be no more than an advisory opinion by the federal courts. The "case or controversy" requirement of the constitution requires dismissal of HOME. Therefore, this Court should reverse the Fourth Circuit's decision that HOME has standing to assert its claim.

II. THE INDIVIDUAL PLAINTIFFS LACK STANDING IN THEIR CAPACITY AS TESTERS BECAUSE THEY HAVE ALLEGED NO INJURY TO THEMSELVES IN THAT CAPACITY

Respondents Sylvia Coleman and R. Kent Willis, employees of HOME (App.13), tested the defendants' compliance with the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, in March and on July 6, 1978 (App. 16-17). The Fourth Circuit erroneously held that Coleman and Willis had standing.

The fact that individual plaintiffs in this case are testers has no bearing on the minimum constitutional requirements for standing. All plaintiffs must allege that they have a distinct and palpable injury, caused by the allegedly wrongful act of the defendants, *Warth v. Seldin*, 422 U.S. 490, 499 (1975), which is substantially likely to be redressed by the requested relief. *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 (1973). However, the Fourth Circuit in this case analyzed these plaintiffs' standing in two ways. First, the court held that they had standing in

their capacity as testers, without regard to any allegations of injury, causal nexus between the injury and the act of which complaint was made, or remediableness. Second, according to the court, they also had standing as persons deprived of the benefits of interracial association. This brief will analyze these two alternative grounds separately because the Fourth Circuit held that Coleman and Willis have standing on either ground alone. In fact, Coleman and Willis have standing on neither ground, and both of the Fourth Circuit's holdings therefore require correction by this Court.

In discussing the standing of the testers in their capacity as testers, the Fourth Circuit apparently reasoned that because of the strong public policy considerations underlying the Fair Housing Act, testers should have standing as "surrogates" for persons who are genuinely injured (App.71), without regard to *any* of the constitutional requirements for standing. While this Court has often recognized that Congress may grant standing to persons who would otherwise be barred by prudential standing limitations, *see e.g. Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91, 100 (1979); *Warth,* 422 U.S. at 501, and indeed has done so with respect to the Fair Housing Act, *Bellwood,* 441 U.S. at 109; *Trafficante v. Metropolitan Life Insurance Company,* 409 U.S. 205, 209 (1972), it is also absolutely clear that Congress cannot alter the constitutional requirements for standing. Thus, although standing under the Fair Housing Act is as broad as constitutionally permitted, there are constitutional limitations regardless of the social importance of the substantive nature of the claim.

The Fourth Circuit sought to justify its holding that tester status alone confers Article III standing by citing *Pierson v. Ray,* 386 U.S. 547 (1967) (hereafter *"Pierson"*), and *Evers v. Dwyer,* 358 U.S. 202 (1958) (hereafter *"Evers"*). In *Pierson,* black persons occupied the "whites only" section of a bus station to "test" the validity of a municipal ordinance requiring racial segregation. The black plaintiffs in *Evers* "tested" a similar ordinance by occupying the white section of a bus. This Court held in both cases that simply because the plaintiffs violated the ordinances in order to test their constitutionality

does not deprive the plaintiffs of standing. The so-called "testers" in *Evers* and *Pierson* each suffered specific injury by being unlawfully deprived because of their race of the right to occupy certain public accommodations or conveyances. This Court ruled that Article III is satisfied when such specific injury is present, whether or not plaintiffs incurred the injury solely for the purpose of instituting litigation. The Fourth Circuit, however, inverted the analysis in *Pierson* and *Evers*, and held that, so long as a plaintiff takes action for the purpose of determining whether a law is being violated, standing is conferred, whether or not the plaintiff suffered any distinct and palpable injury at the hands of the defendant.

The approach of the court of appeals to this question is unsupported by prior authority. The standing limitations imposed by Article III of the United States Constitution require that a plaintiff assert a distinct and palpable injury to himself, *Warth*, 422 U.S. at 501 (1975), that is likely to be redressed by the requested relief. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). In this case, plaintiffs did not allege any injury to themselves as testers, and the Fourth Circuit did not find any injury. These plaintiffs did not seek to exercise any rights of their own, as did the plaintiffs in *Pierson* and *Evers*, and do not allege injury to themselves as a result of the denial of the rights of others. Under Article III principles previously announced by this Court, these plaintiffs simply do not have standing in their capacity as testers.

Although the standing of testers has been placed in issue in several lower court cases, the question has always been resolved on the basis of the injury they alleged as persons deprived of the benefits of interracial association. *See e.g. Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Heights Community Congress v. Hilltop Realty, Inc.*, No. C79-422 (N.D.Ohio, December 31, 1980) (App.1-31 in Petitioners' Supplement to Petition for Writ of Certiorari); *Sherman Park Community Association v. Wauwatosa Realty Co.*, 486 F. Supp. 838 (E.D.Wis. 1980); *Village of Bellwood v. Dwayne Realty*, 482 F. Supp. 1321 (N.D.Ill. 1979). In other words, there was an injury that was

alleged to have occurred to those persons in their *individual* capacity. Prior to the decision of the Court of Appeals in the instant case, a court has never suggested that a tester has standing to vindicate the rights of others without regard to any personal injury having been sustained by the tester.

One of the clearest expressions of the kind of allegations which must appear in a complaint in order to demonstrate standing appears in *Warth v. Seldin*, in which the plaintiffs challenged exclusionary zoning practices of the town of Penfield, New Jersey. In *Warth*, the minority group plaintiffs alleged that, as a result of Penfield's exclusionary zoning scheme, they were unable to live in Penfield. The Court stated, however:

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention.

Warth, 422 U.S. at 508. *See also Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

Applying the foregoing standards to this case, there is no basis whatsoever for concluding that the testers, solely in their capacity as testers, have standing. The complaint is utterly devoid of a single factual allegation that the testers suffered any injury in their capacity as testers. This being the case, it is conceptually impossible for a tester to show that he would, in his capacity as a tester, benefit from the court's intervention.

From a policy standpoint, there is no need to grant standing to a tester solely in his capacity as a tester. In *Bellwood*, this Court recognized the distinction between an individual who is a resident of the affected area, and who therefore is affected individually by the acts of the defendants, and a tester who is a tester only and not affected individually by the acts of the defendants. *Bellwood*, 441 U.S. at 97-98 and 111. The principal argument for granting standing to the individual residents of the affected area is that it is necessary for the full enforcement of the fair housing laws that Congress

intended, *i.e.*, there is a need for a pool of private attorneys general to insure enforcement of the fair housing laws. *See Trafficante*, 409 U.S. at 211. This pool is established, and in fact continually renewed, by the actual residents of the affected area who are or may be affected by the acts of the defendants. It is these people whose daily lives may be affected by a violation of the fair housing laws, and with their standing to bring an action for a breach of the fair housing laws now firmly established by *Bellwood*, it is clear that few discriminatory housing practices will go unchallenged if a tester, solely in his capacity as a tester, is denied standing.

By conferring standing on testers solely in their capacity as testers, the Fourth Circuit removed any consideration of harm or injury to the plaintiff as an Article III standing requirement. The Fourth Circuit's opinion authorizes a tester who resides in New York, to fly to Chicago over the weekend, conduct tests on a realtor or property owner in Chicago, and then, if the tester believes that the tests demonstrate unlawful activity under the Fair Housing Act, to commence an action in Chicago. This hypothetical testor does not, according to the Fourth Circuit, have to show or even allege that he was injured in any way in his capacity as a tester. This result is clearly at odds with the most fundamental requirements for standing and should be reversed.

III. THE INDIVIDUAL PLAINTIFFS LACK STANDING AS PERSONS DEPRIVED OF THE BENEFITS OF INTERRACIAL ASSOCIATION BECAUSE THEY HAVE NOT ALLEGED A SUFFICIENT CAUSAL NEXUS BETWEEN THEIR INJURY AND THE CHALLENGED ACTS OF THE DEFENDANTS.

The court of appeals also held that the individual plaintiffs, who alleged they had been deprived of the benefits of interracial association, have standing under the Fair Housing Act. In this decision, the Court of Appeals went far beyond this Court's prior decisions concerning standing under the Fair Housing Act in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). The decision of the court of appeals

effectively grants standing to anyone who includes in his complaint the conclusory allegation that he is "deprived of the benefits of interracial association," whether or not there is a logical causal nexus between the defendants' acts and the deprivation. Thus, the decision of the court of appeals effectively eliminates the constitutional requirement that a plaintiff "must allege specific concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit in a tangible way from the courts' intervention." *Warth v. Seldin*, 422 U.S. 490, 508 (1975) (emphasis in original).

The individual plaintiffs in this case alleged only that they are residents of the City of Richmond or the County of Henrico, two contiguous political subdivisions with a population of nearly 400,000 people (App.77). They also claim that defendants' alleged practice in two adjacent apartment complexes in Henrico County "contributes to maintaining existing neighborhood segregation and inhibits the development of stable racially integrated neighborhoods," apparently in the entire Richmond Metropolitan Area (App.14), which presumably includes at least the City of Richmond, the County of Henrico and the County of Chesterfield, an area with a population of well over one-half million people. Nowhere, however, do the individual plaintiffs allege any facts to show how the acts of the defendants cause injury to the entire Richmond Metropolitan Area, nor can that effect be plausibly assumed.

The issue here is the difficult one of determining, from the Complaint, what must be alleged concerning the causal relationship between the acts of the defendants and the alleged injury in order for the court to determine that the allegations are sufficient to evidence standing. The Fourth Circuit simply did not focus upon this issue.

Article III patently requires a causal connection between act and injury. *Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). In *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (hereafter "*Linda R.S.*"), the plaintiff sought to enjoin what she alleged to be the discriminatory application of a Texas statute that concerned child

support. The statute had been construed by Texas courts only to require child support payments by parents of legitimate children and the plaintiff claimed that the refusal of the district attorney to enforce the statute in the case of illegitimate children was discriminatory and harmful to her. This Court noted that the statute in question only provided criminal penalties and characterized as "speculative" the plaintiff's inference that, notwithstanding the limitation of the statute to criminal penalties, enforcement would result in future payments. *Linda R.S.*, 410 U.S. at 618. This Court, therefore, held that there was an insufficient causal nexus between the alleged injury (the deprivation of support payments) and the challenged acts. In so doing, this Court stated that the " 'direct' relationship between the alleged injury and the claim sought to be adjudicated is absent." *Linda R.S.*, 410 U.S. at 615.

Based upon the foregoing, there is no doubt that the plaintiffs in this case must allege a clear causal relationship between the alleged act of the defendants, and the actual injury. *See also O'Shea v. Littleton*, 414 U.S. 488 (1974); *Laird v. Tatum*, 408 U.S. 1 (1972). The inquiry, therefore, is not whether allegations of a causal nexus need be present in a complaint, but rather whether the allegations made are sufficient.

This Court expressly addressed the sufficiency of allegations of causal nexus in *Warth*, a case in which low-income plaintiffs alleged that the exclusionary zoning practices of the town of Penfield caused them to be unable to reside there. The Court noted:

> We may assume, as petitioners allege, that respondents actions have contributed, perhaps substantially, to the cost of housing in Penfield. But there remains the question whether petitioners' ability to locate suitable housing in Penfield reasonably can be said to have resulted in any concretely demonstrable way from respondents' alleged constitutional and statutory infractions.

Warth, 422 U.S. at 504. In other words, the Court conceded that there was, in fact a relationship between the act (exclusionary zoning) and an effect (increased housing costs), but could not go the further step to find a causal relationship between the act and the injury. The plaintiffs were required to show not just a loss of potential opportunity to acquire housing, but a loss of specific housing and a reasonable basis for the conclusion that concrete future benefits would result from adjudication:

> Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield, and that if the court affords the relief requested the asserted inability of petitioners will be removed.

Warth, 422 U.S. at 504. Thus, although the injury need not be direct, the problem of indirectness in the causal nexus between act and injury made it impossible to conclude that the injury was, in fact, the consequence of the act. Hence, minimal Article III requirements were not satisfied.

The allegations of the individual plaintiffs in this case suffer from the same inadequacies as the allegations that were found insufficient in *Warth*. In *Warth*, the plaintiffs alleged that an illegal act, exclusionary zoning, occurred; in the instant case, the plaintiffs allege that an illegal act, racial steering, occurred. In *Warth*, the plaintiffs alleged that an effect of the illegal act was increased housing costs; in the instant case, the plaintiffs allege that an effect of the illegal act is contributing to the maintenance of neighborhood segregation in the Richmond Metropolitan Area (App. 14). In *Warth*, the plaintiffs alleged that the increased housing costs had the further effect of precluding them from locating suitable housing in Penfield, but this Court recognized that many additional factors could have caused that injury, *Warth* 422 U.S. at 505-09; similarly, in the instant case, many other factors, according to the plaintiffs' own allegations, deprive them of the benefits of interracial association. The only allegation that draws any nexus between the

alleged acts of the defendants and the ultimate injury those acts are supposed to have created appears in paragraph 10 of the Complaint:

> 10. Like other metropolitan areas throughout the United States, the Richmond Metropolitan Area, including Henrico County, has been marked by racially segregated residential housing patterns. Neighborhoods have reflected the impact of segregation resulting from the actions of private individuals and groups, restrictive covenants, zoning and other factors, so that area neighborhoods can generally be identified as "white" or "black" neighborhoods. The practice or [*sic*] "racial steering" engaged in by these defendants, contributes to maintaining existing neighborhood segregation and inhibits the development of stable racially integrated neighborhoods.

(App.14) The individual plaintiffs merely allege that they are residents of either the City of Richmond or Henrico County, Virginia (App. 13), an area consisting of over 400,000 people (App. 77). By their own allegations, plaintiffs have demonstrated that they suffer from the same disability as the petitioners in *Warth*.

Thus, in this case as in *Warth*, the plaintiffs must allege facts from which it reasonably could be inferred that, absent the defendants' alleged acts, there is a substantial probability that they would not have been denied the benefits of interracial association. The Fourth Circuit held, in effect, that merely by alleging that they were residents of the City of Richmond and Henrico County, and that the acts of the defendants "contribute" to maintaining existing neighborhood segregation in the Richmond Metropolitan Area, the individual plaintiffs had sufficiently alleged a nexus between the injury and the acts of the defendants. That conclusion, very simply, is a quantum leap of faith that is unsupportable and incorrect. The individual plaintiffs failed to plead a single fact that would justify any reasonable inference that the alleged discrimination at two adjacent apartment complexes in Henrico County has denied, or "contributed" to the denial, of the benefits of interracial association, to every one of the 400,000 residents of the City of Richmond and County of Henrico.

The Fourth Circuit's opinion is inconsistent with the analysis of causal nexus mandated by *Warth* and is not in any manner supported by *Bellwood* or *Trafficante*. In *Bellwood*, four residents of an integrated neighborhood allegedly "targeted" by the defendant for racial steering were found to have standing because the defendants' conduct allegedly jeopardized their right to live in an integrated community. However, summary judgment was affirmed against two non-residents of the affected area who alleged no facts to show how steering directed towards the target neighborhood affected the areas where they resided. *Bellwood*, 441 U.S. at 111 n.25. Furthermore, in *Bellwood*, it was reasonable to conclude that the defendants' conduct affected an entire neighborhood because the defendants were residential real estate brokers who sold houses in that neighborhood. By contrast, the defendants in the case at bar manage two adjacent apartment complexes and cannot reasonably be said to affect the entire Richmond Metropolitan Area. Similarly in *Trafficante*, the plaintiffs were residents of the apartment complex that was the target of defendants' alleged discrimination. They had standing to challenge their landlord's discriminatory rental policies because those policies denied the plaintiffs the right to live in an integrated comunity. *Trafficante*, 409 U.S. at 206. The *Trafficante* plaintiffs resided in the apartment complex where the acts of discrimination occurred. Therefore, it was reasonable to conclude from those facts that the plaintiffs suffered actual injury that would be redressed by cessation of the alleged discrimination. *Bellwood* and *Trafficante* clearly did not hold, as the Fourth Circuit has here, that racial discrimination practiced by a landlord of an apartment complex could be challenged by all persons residing in an entire metropolitan area absent the allegation of facts which justify that conclusion.

Obviously, a formula for the sufficiency of causal nexus allegations that would apply to all Fair Housing Act cases cannot be articulated. The sufficiency must, in each case, ultimately depend upon the nature of the defendant's act, where the act occurs, the demographic factors of the area where the act occurs, and a variety of other factors. The Fourth Circuit's holding, however, that a simple conclusory allegation

that every resident in the City of Richmond and County of Henrico is deprived of the benefits of interracial association by virtue of the acts of the defendants at two adjacent apartment complexes clearly exceeds any reasonable test for determining standing based upon the allegations appearing in a complaint. If such conclusory allegations are capable of ultimate proof at trial, then there must exist a reasonable set of facts to support them. Those facts, relating the causal nexus between the injury and the allegedly unlawful act, must be set forth in the complaint. Requiring the allegation of specific, concrete facts is essential to permit the court to ascertain with reasonable certainty at the outset that the power of the court is not being invoked unnecessarily and gratuitously.

Thus, in holding that the individual plaintiffs have standing based on the alleged deprivation of the benefits of interracial association, the Fourth Circuit erred by failing to recognize the insufficiency of the causal nexus between the plaintiffs' alleged injury and the alleged wrongful act. Its decision should be reversed.

IV. PLAINTIFFS' CLAIMS UNDER THE FAIR HOUSING ACT ARE BARRED BY THE LIMITATION PERIOD IN SECTION 3612(a) BECAUSE THEY DID NOT COMMENCE THIS ACTION WITHIN 180 DAYS AFTER BEING FULLY APPRISED OF THE FACTS AND OF THEIR RIGHTS, IF ANY, UNDER THE ACT.

The district court below found that all claims under the Fair Housing Act, except those based on the alleged discriminatory act of July 13, 1978, were time barred (App.33). The Court of Appeals for the Fourth Circuit reversed, citing various cases in which courts have recognized continuing violations under the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (hereafter Title VII), as well as *Baker v. F & F Investment,* 420 F.2d 1191 (7th Cir. 1970), a case brought under Section 1982 of the Civil Rights Act of 1866, 42 U.S.C. § 1982 (App. 79-80). According to the court of appeals, there was a "continued relationship" between plaintiffs and defendants and a "continued violation" of the Fair Housing Act until

July 13, 1978; therefore the limitation period had not run when this action was filed (App. 81).

The difficult question thus presented is when the limitation period of the Fair Housing Act starts to run on the claims of persons who, like the plaintiffs, are not the direct objects of discrimination, yet allegedly suffer its results. Plaintiffs allege that in March and July of 1978, Coleman and Willis "tested" Havens' compliance with the Fair Housing Act, and concluded that Havens was engaged in racial steering in violation of the Act. Yet they sat on their rights, and did not file the present action until more than 180 days after these tests.[6]

Section 3612(a) of the Fair Housing Act provides simply: "a civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." 42 U.S.C. § 3612(a). A discriminatory housing practice is defined as "*an act* that is unlawful under section 804, 805 or 806" [42 U.S.C. §§ 3604, 3605, 3606]. 42 U.S.C. § 3602 (emphasis added). The plain language of the section mandates that in March, 1978, when Coleman and Willis inquired about vacancies at Colonial Court and Camelot Townhouses and determined that a violation of the Fair Housing Act had then occurred, the limitation period started to run.[7]

In March, 1978, Coleman, Willis and HOME were fully apprised of the facts and of their rights, if any, to bring their action under the Fair Housing Act, yet they did not do so. Their action is thus plainly time barred unless the fact that they alleged a continuing violation, specifically a "pattern or practice" of discrimination, saves the action, or unless their status as

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[6] The events of July 13, 1978, a date within the limitation period on which the action of Paul Allen Coles was based, did not involve Coleman or Willis.

[7] Three "tests" were conducted in March, 1978. Although defendants believe the limitation period began to run with the first "test," the period ran with respect to each of the tests in March and the one on July 6, 1978, before the present action was filed. Thus, it is unnecessary to consider when Coleman and Willis actually became convinced that a violation had occurred, except to conclude that surely by the fourth "test" on July 6, 1978, they had no further doubt.

persons allegedly deprived of the benefits of interracial association precludes the running of the limitation period.

The latter contention would indefinitely extend the period in which plaintiffs may sue, based on their allegation that they continue to suffer injury from the allegedly discriminatory acts of Havens. The argument that an action may be based on continuing effects of past discrimination was an important continuing violation theory in Title VII cases prior to this Court's decision in *United Air Lines, Inc. v. Evans*, 431 U.S. 533 (1977).[8] In *Evans*, this Court held that an airline flight attendant whose employment was wrongfully terminated in 1968 could not, after she was rehired, base a Title VII action on the fact that she continued to suffer the adverse effects of that termination. This Court stressed that the act of discrimination against Evans occurred in 1968; the application to her of a facially neutral seniority system was not a present violation of Title VII. The same rationale is appropriate with respect to Coleman and Willis. Although they allegedly continue to suffer the effects of Havens' alleged discrimination, they point to no act of discrimination against them within the limitation period, and their claims are therefore barred.

A contrary conclusion would mean that there is no effective limitation on the bringing of an action by one who alleges deprivation of the benefits of interracial association, since that effect could conceivably continue for years after cessation of any violation. This result is plainly not contemplated by the mandatory language of the statute: "a civil action *shall* be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred." 42 U.S.C. § 3612(a) (emphasis added).

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[8] *See e.g. Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976); *Williams v. Norfolk and Western Railway Co.*, 530 F.2d 539 (4th Cir. 1975); *Marquez v. Omaha District Sales Office*, 440 F.2d 1157 (8th Cir. 1971); *Kennan v. Pan American World Airways, Inc.*, 424 F. Supp. 721 (N.D.Cal. 1976); *Burwell v. Eastern Air Lines, Inc.*, 394 F. Supp. 1361 (E.D.Va. 1975); *Tippett v. Liggett & Meyers Tobacco Co.*, 316 F. Supp. 292 (M.D.N.C. 1970); *Austin v. Reynolds Metals Co.*, 327 F. Supp. 1145 (E.D.Va. 1970).

If Coleman and Willis are permitted to bring their action as long as the effects of the alleged discrimination continue, one who is not the object of discrimination would have a distinct advantage over one who is the object of discrimination whose action must still be filed within 180 days of the discrimination against him. Although persons who have genuinely been deprived of the benefits of interracial association may sue to enforce the rights of others, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), they should not be permitted greater rights than those whose rights they enforce.

In *Delaware State College v. Ricks*, ____U.S.____, 101 S. Ct. 498, 505, 66 L.Ed.2d 431 (1980), this Court noted that "time-limitations provisions themselves promote important interests; the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones," quoting *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-4 (1975). Balancing the interests of the plaintiffs in the case at bar with the interests of defendants demonstrates that the position for which the plaintiffs argue would wholly eliminate any protection for defendants under the Fair Housing Act from stale claims, since plaintiffs would have an indefinite period in which to institute their action. Where contact between plaintiffs and defendants is fleeting—consisting of telephone calls or meetings of a few moments duration—protection for the defendants is particularly important. Congress has made the value judgment that private claims based on acts occuring more than 180 days prior to the institution of the action are stale, and that value judgment is binding on this Court.

Plaintiffs have not advanced any reason for their failure to file their action in March, 1978, nor have they denied that they could have done so. Although there may be situations in which a lay person is unaware of the fact that discrimination has been practiced against him, plaintiffs clearly do not fall into such a category. In view of the fact that they deliberately set out to test Havens' compliance with the Fair Housing Act, there can be no question that they were fully aware of their rights. No

reasons of policy appear to suggest that they should be permitted to sit deliberately on their rights.

In both the court of appeals and district court, plaintiffs argued that, because they had alleged that they continue to suffer injury as a result of defendants' alleged discrimination, and because they alleged a "continuing pattern of discrimination" (App. 41), the limitation period of Section 3612 is "tolled" [9] (App. 42). Plaintiffs' reliance on their allegations of a continuing violation to preclude the running of the limitation period in this case is inappropriate and unnecessarily confuses the issue. As previously demonstrated, the limitation period, under the circumstances of this case, started to run against Coleman, Willis and HOME at least by July 6, 1978, and had run before the date the action was filed.

To respond to plaintiffs' attempt to bring themselves within the so-called continuing violation theory utilized in Title VII cases, however, it is necessary to recognize, first that "pattern or practice" actions are committed by the Fair Housing Act to the Attorney General of the United States, and, second, that even if a continuing violation theory were appropriate under Title VIII, such a violation is not present in this case.

The Fair Housing Act provides for enforcement either by private plaintiffs under Section 3612, 42 U.S.C. § 3612, or by the Attorney General of the United States under Section 3613, 42 U.S.C. § 3613, when the Attorney General "has reasonable cause to believe that any person is engaged in a *pattern or practice* of resistance to the full enjoyment of any of the rights granted by this subchapter." 42 U.S.C. §3613(a) (emphasis added). Of course, private plaintiffs have no standing to sue under Section 3613.

Unlike Section 3612, Section 3613 contains no express limitation period. The language of Section 3613 suggests that a pattern or practice suit by the Attorney General is timely if filed

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[9] Although plaintiffs use this language, they do not appear to argue that the federal doctrine of equitable tolling is applicable to this case. Rather, they rely by analogy on the continuing violation theory utilized in Title VII cases, 42 U.S.C. § 2000e *et seq.*, to save actions which would otherwise be barred by the limitation period in 42 U.S.C. § 2000e-5(e).

concurrently with the alleged pattern or practice of discrimination.[10] Section 3612, under which plaintiffs' action is (and must be) brought does contain an express and mandatory limitation. Although by its standing decisions this Court has recognized a class of "private attorneys general" entitled to sue under the Fair Housing Act, *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Insurance Co.,* 409 U.S. 205 (1972), these are still private plaintiffs who must comply with the private enforcement provisions of the Fair Housing Act. Plaintiffs' allegations of a "pattern" of discrimination do not alter the question which must be answered in every case under Section 3612: was the action "commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred"? 42 U.S.C. §3612(a). Plaintiffs' "pattern or practice" allegations add nothing to the proper resolution of that question.

Furthermore, even if a continuing violation rationale is appropriate under Title VIII,[11] the alleged acts of discrimination do not constitute a continuing violation which

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[10] Under the analogous provision of Title VII, this Court has held that no statute of limitations applies to the Equal Employment Opportunity Commission's "pattern or practice" actions under 42 U.S.C. § 2000e-5(f)(1). *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission,* 432 U.S. 355 (1977).

[11] Since this Court's decision in *United Air Lines, Inc. v. Evans,* 431 U.S. 533 (1977), the validity of the continuing violation theory under Title VII has been questioned, provoking considerable commentary in the secondary literature. *See e.g. The Continuing Violation Theory of Title VII After United Air Lines, Inc. v. Evans,* 31 Hastings L. J. 929 (1980); Jackson and Matheson, *The Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits,* 67 Geo. L. J. 811 (1979); *Title VII and the Continuing Violation Theory: A Return to Congressional Intent,* 47 Fordham L. Rev. 894 (1979); *Continuing Violations of Title VII: A Suggested Approach,* 63 Minn. L. Rev. 119 (1978); *Continuing Violations in Private Suits Under Title VII of the Civil Rights Act of 1964,* 32 Ark. L. Rev. 381 (1978). The more recent decision in *Delaware State College v. Ricks,* ____U.S.____, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), further emasculated the continuing violation theory in holding that the mere continuance of an employment relationship does not prevent the limitation period from running. In *Evans* and *Ricks,* this Court determined that the limitation period started to run on the date the alleged violation occurred. Thus, the application of the continuing violation theory has been at least narrowed, and has perhaps been precluded from saving otherwise time-barred actions by these decisions.

would preclude the running of the limitation period. There may be violations of the Fair Housing Act which cannot be said to occur at any identifiable point in time and which are conceptually thought of as occurring in a continuing fashion. But in the case at bar, the alleged steering by Havens consists of specific and discrete acts, occurring at identifiable points in time. They are in no sense "continuing." As the district court in *Stingley v. City of Lincoln Park*, 429 F. Supp. 1379 (E.D.Mich. 1977) aptly stated:

> Here, in the case at bar, the contact between the plaintiff and the defendant was such that an exact date can be determined on which the alleged discriminatory practice occurred. If there was validity to the argument that because the defendant still maintained its residency policy that there was a continuing discriminatory act, then the time limits of Title VII [*sic*] would become entirely meaningless. For example, in every case of employment discharge brought under Title VII, plaintiffs invariably plead a pattern and practice of discriminatory conduct. Since this pattern and practice arguably continues, the end result would be that a discharged employee would have forever to bring his complaint. Such was clearly not the intention of Congress in enacting the time limits that are contained in both Title VII and Title VIII. Similarly, as applied to the facts in this case, the argument advanced by the plaintiff would mean that there would be no time limit in which they would have had to institute action.

Id. at 1391. The Complaint filed by the plaintiffs in the case at bar alleges specific and discrete acts of discrimination which occurred more than 180 days before their complaint was filed. They failed to act on any claims which arose from these acts. The statute of limitations plainly bars such claims.

The fact that plaintiffs allege four discrete violations, rather than one, does not change the nature of the violation into one that did not occur at an identifiable point in time. As the Third Circuit Court of Appeals correctly reasoned in holding that the

limitation period under Section 3612(a) had run on a tester who prompted several identical violations:

> Such a tactic, if permitted, would enable a victim of alleged discrimination to circumvent the statute of limitations merely by provoking his adversary into another refusal to sell or rent. We cannot believe that Congress intended the 180 day limitation of section 3612(a) to operate in such a fashion.

Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894, 899 (3d Cir. 1977). The plaintiffs in the case at bar have similarly alleged acts of discrimination against them beyond the 180 day period. To permit them to maintain the action would be to abrogate the limitation period established by Congress.

The court of appeals apparently believed that a "continued relationship" between plaintiffs and defendants existed because of the repetitious contact between them and that this relationship was sufficient to show a continuing "practice of prohibited discrimination against these specific individuals" (App. 81). It is difficult to understand how the plaintiffs and defendants in this case could be said to have had a continuing relationship. Havens had no contact or communication with HOME at all, except through its testers. The testers themselves never sought any relationship with Havens, and the communications between the testers and Havens consisted of telephone calls or meetings lasting a few moments.

Furthermore, in *Delaware State College v. Ricks*, ____ U.S. ____, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), this Court emphasized that continuity of relationship is not sufficient to establish a present violation of Title VII. In that case, a professor alleged that he had been discriminatorily denied tenure. As was the customary procedure, Ricks was granted a one-year terminal contract, which he accepted. He argued that the limitation period did not begin to run until his employment relationship with Delaware State College ended. In rejecting this argument, the Court noted that the discriminatory denial of tenure occurred at least by June 26, 1974, although that denial

was reaffirmed on later dates. Neither the subsequent reaffirmations of the denial, nor the fact that an employment relationship between Ricks and the college continued, prevented the limitation period from running.

The approach taken by this Court in *Evans* and *Ricks* in Title VII cases in which continuing violations were alleged is the approach which should be taken in the case at bar. The limitation period starts to run on the date the alleged violations occurred. The plaintiff must file his action within 180 days of that date. Coleman, Willis and HOME did not do so, and their action is barred. Accordingly, the decision of the Fourth Circuit to the contrary should be reversed.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fourth Circuit should be reversed and judgment entered for the petitioners.

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I hereby certify that three (3) copies of the foregoing Brief For Petitioners have been served by mail on Vanessa Ruiz-de-Elejalde, Fried, Frank, Harris, Shriver & Kampelman, 600 New Hampshire Avenue, N.W., Suite 1000, Washington, D.C. 20037, counsel of record for the respondents.

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No. 80-988

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION AND ROSE JONES,
Petitioners,

v.

SYLVIA COLEMAN, R. KENT WILLIS
AND
HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether individuals have standing to sue under the Fair Housing Act when they have alleged that they are residents of a community affected by defendants' practice of racial steering, which has deprived them of the benefits of interracial associations.

2. Whether an individual who seeks rental information from a defendant has standing to sue under the Fair Housing Act when that individual has alleged that the defendants knowingly, on the basis of race, gave misinformation regarding the availability of rental housing.

3. Whether a nonprofit membership organization which provides direct housing counseling services to homeseekers has standing under the Fair Housing Act to seek redress for injury, on its own behalf for interference with its normal operations and on behalf of its members for deprivation of the right to the benefits of interracial associations, caused by defendants' discriminatory practices.

4. Whether a policy, pattern or practice of discrimination is cognizable as a continuing violation of the Fair Housing Act, when at least one of the series of discriminatory incidents occurs within the 180-day limitations period.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 10

ARGUMENT:

I. The Court Of Appeals Was Compelled By This Court's Decision In *Bellwood* To Reverse The District Court's Erroneous Dismissal Of The Complaint 12

II. Plaintiffs-Respondents Coleman And Willis Have Standing Under The Fair Housing Act Because They Have Alleged Injury To Themselves As A Result Of Havens' Unlawful Racial Steering Practices 19

A. Coleman and Willis have standing to sue under *Bellwood* because they have alleged that Havens' racial steering practices have deprived them of their right to the benefits of interracial associations 20

B. Coleman has standing to sue because she has been denied the right to obtain unbiased housing information secured by section 804(d) of the Fair Housing Act 26

III. Plaintiff-Respondent HOME Has Standing Under The Fair Housing Act Because It Has Alleged Injury To Itself And To Its Members As A Result Of Havens' Unlawful Racial Steering Practices 30

A. HOME has standing under the Fair Housing Act because it alleged a distinct injury to

Page

itself, resulting from Havens' racial steering practices 31

B. HOME has standing as a representative of its members who are alleged to have been injured as a result of Havens' racial steering practices 39

IV. Plaintiffs-Respondents' Claims Under The Fair Housing Act Were Timely Filed 42

CONCLUSION

APPENDICES:

A. *Coles v. Havens Realty Corp.*, Findings of Fact of Hon. D. Dortch Warriner, No. 79-0024-R (E.D. Va., Jun. 23, 1980) 1a

B. *Coles v. Havens Realty Corp.*, Consent Order, No. 79-0024-R (E.D. Va., Feb. 17, 1981) 10a

C. Constitutional Provision and Statutes Involved 19a

TABLE OF AUTHORITIES

Page

Cases:

Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981) 46

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 36

Baker v. Carr, 369 U.S. 186 (1962) 31

Baker v. F&F Investment Co., 420 F.2d 1191 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970) 45

Blockman v. Sandalwood Apartments, 613 F.2d 169 (7th Cir. 1980) 36

Broadmoor Improvement Association v. Stan Weber & Associates, Inc., 597 F.2d 568 (5th Cir. 1979) 9, 18

Cedeck v. Hamiltonian Federal Savings & Loan Association, 551 F.2d 1136 (8th Cir. 1977) 46

City of Chicago Heights v. Arquilla-DeHaan Realtors, Inc., No. 77-C-3305 (N.D. Ill., May 21, 1980) 34, 35, 45

Coleman v. Havens Realty Corp., 633 F.2d 384 (4th Cir. 1980) 1

Coles v. Havens Realty Corp., No. 79-0024-R (E.D. Va., Jun. 23, 1980) 1

Concerned Tenants Association of Indian Trails Apartments v. Indian Trails Apartments, 496 F. Supp. 522 (N.D. Ill. 1980) 12, 46, 47

Conley v. Gibson, 355 U.S. 41 (1957) 13, 21

Cox v. United States Gypsum Co., 409 F.2d 289 (7th Cir. 1969) 46

Curtis v. Loether, 415 U.S. 189 (1974) 29

Denny v. Hutchinson Sales Corp., 649 F.2d 816 (10th Cir. 1981) 43

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 16

Evers v. Dwyer, 358 U.S. 202 (1958) 9, 28, 29

Fair Housing Council, Inc. v. Eastern Bergen County Multiple Listing Service, Inc., 422 F. Supp. 1071 (D.N.J. 1976) 41, 45

Cases, continued:

Page

Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) ..... *passim*

Bellwood Joint Appendix 4, 5 ..... 15, 34

Gonzalez v. Firestone Tire & Rubber Co., 610 F.2d 241 (5th Cir. 1980) 46

Gore v. Turner, 563 F.2d 159 (5th Cir. 1977) 28

Grant v. Smith, 574 F.2d 252 (5th Cir. 1978) 28

Heights Community Congress v. Hilltop Realty, Inc., No. C-79-422 (N.D. Ohio, Dec. 31, 1980) 16, 37

Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976) 13

Huertas v. East River Housing Corp., 81 F.R.D. 641 (S.D.N.Y. 1979) 17, 37, 41, 43

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 10, 12, 39

Jenkins v. McKeithen, 395 U.S. 411 (1969) 13

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 43

Linda R.S. v. Richard D., 410 U.S. 614 (1973) 17, 23

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 46

McDonald v. Verble, 622 F.2d 1227 (6th Cir. 1980) 35

Meyers v. Pennypack Woods Home Ownership Association, 559 F.2d 894 (3d Cir. 1977) 12, 43, 44, 45, 47

Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975) 43

Mulqueeny v. National Commission on the Observance of International Women's Year, 1975, 549 F.2d 1115 (7th Cir. 1977) 34, 35

O'Shea v. Littleton, 414 U.S. 488 (1974) 17

Park View Heights Corp. v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972) 43

Pierson v. Ray, 386 U.S. 547 (1967) 9, 28, 29

Powell v. McCormack, 395 U.S. 486 (1969) 9

Cases, continued: Page

Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974) 17, 37

Seaton v. Sky Realty Co., 491 F.2d 631 (7th Cir. 1974) 28

Sherman Park Community Association v. Wauwatosa Realty Co., 486 F. Supp. 838 (E.D. Wis. 1980) 16, 41

Sierra Club v. Morton, 405 U.S. 727 (1972) . . . . . *passim*

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 11, 16, 31

Stingley v. City of Lincoln Park, 429 F. Supp. 1379 (E.D. Mich. 1977) 44

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) 43

TOPIC v. Circle Realty, 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976) 5, 6, 10, 13, 18, 30

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) . . . . . *passim*

Trafficante v. Metropolitan Life Insurance Co., 322 F. Supp. 352 (N.D. Cal.), *aff'd* 446 F.2d 1158 (9th Cir. 1971), *rev'd and remanded*, 409 U.S. 205 (1972) 15

Turner v. A.B. Carter, Inc., 85 F.R.D. 360 (E.D. Va. 1980) 9

United Airlines, Inc. v. Evans, 431 U.S. 553 (1977) 44

United States v. Long, Eq. Opp. Hsg. Rptr. (P-H) ¶ 13,631 (D.S.C. 1972), *modified as to relief and aff'd*, Eq. Opp. Hsg. Rptr. (P-H) ¶ 13,733 (4th Cir. 1974) 35

United States v. Reddoch, Eq. Opp. Hsg. Rptr. (P-H) ¶ 13,569 (S.D. Ala. 1972) 35

United States v. Richardson, 418 U.S. 166 (1974) 17

United States v. SCRAP, 412 U.S. 669 (1973) 35, 36

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) 10, 34, 36

Village of Bellwood v. Gladstone Realtors, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979) 34

Cases, continued: Page

Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 429 F. Supp. 486 (E.D.N.Y. 1977) 17

Warth v. Seldin, 422 U.S. 490 (1975) . . . . . *passim*

Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977) 48

Constitution and Statutes:

United States Constitution, article III, section 2, clause 1 . . . . . 14, 20, 39

Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1982 (1977) 4, 5, 6, 19, 43

Civil Rights Act of 1964, 92 Stat. 2076, 92 Stat. 2679, 42 U.S.C. § 2000e *et seq.* (1977) 46

Fair Housing Act, Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 81 Stat. 82, 42 U.S.C. § 3601 *et seq.* (1977) (§ 801 *et seq.* of the Act):

3602(d) (§ 802(d) of the Act) 35

3602(f) 48

3604(a) 3, 20

3604(b) 3

3604(c) 3

3604(d) (§ 804(d) of the Act) 3, 9, 11, 20, 27, 35

3604(e) 3

3605 3

3606 3

3610 (§ 810 of the Act) 3, 13

3612 (§ 812 of the Act) . . . . . *passim*

3612(a) (§ 812(a) of the Act) 6, 44

3613 (§ 813 of the Act) 3, 48

3617 3

Page

Miscellaneous:

114 Cong. Rec. 5514-15 (1968) 20, 29

114 Cong. Rec. 5643 (1968) 28

Restatement (Second) of Torts § 766A (1979) 36

Fed. R. Civ. P. 8 13

Fed. R. Civ. P. 60(b)(6) 9

Findings of Fact of Honorable D. Dortch Warriner, No. 79-0024-R (E.D. Va., Jun. 23, 1980) 8, 28, 44

IN THE

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HOUSING OPPORTUNITIES MADE EQUAL,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The Opinion of the Court of Appeals for the Fourth Circuit is reported at 633 F.2d 384 (4th Cir. 1980). The Memorandum Opinion and Order of the District Court for the Eastern District of Virginia (Joint Appendix at 32-35), reversed by the court of appeals, is unreported. Relevant Findings of Fact entered in the only cause of action in this case which survived the motion to dismiss and proceeded to trial, *Coles v. Havens Realty Corp.*, No. 79-0024-R (E.D. Va., Jun. 23, 1980), are unreported

and appear in Appendix A of this brief. The Consent Order entered in that case is reprinted in Eq. Opp. Hsg. Rptr. (P-H) ¶ 18,031 (E.D. Va. 1981) and Appendix B of this brief.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Texts of the following constitutional provision and statutes are set forth in full in Appendix C of this brief:

United States Constitution, article III, section 2, clause 1

Civil Rights Act of 1866

14 Stat. 27, 42 U.S.C. § 1982

Fair Housing Act, Title VIII of the Civil Rights Act of 1968 (1977)

14 Stat. 27, 42 U.S.C. § 1982 (1977)

82 Stat. 81, 92 Stat. 2679, 42 U.S.C. § 3602

82 Stat. 83, 88 Stat. 729, 42 U.S.C. § 3604

82 Stat. 84, 88 Stat. 729, 42 U.S.C. § 3606

82 Stat. 85, 42 U.S.C. § 3610

82 Stat. 88, 42 U.S.C. § 3612

82 Stat. 88, 42 U.S.C. § 3613

82 Stat. 89, 42 U.S.C. § 3617

STATEMENT OF THE CASE

This case began as a challenge to the practice of racial steering in Richmond, Virginia, an area scarred by segregated housing patterns. In its present posture, however, the case challenges this Court's prior decisions according broad standing in fair housing cases, consistent

with the purpose and language of the Fair Housing Act[1] that there be strong private enforcement of the Act. A review of the record in this case shows that by its summary dismissal of the complaint, the district court misconstrued the law and applied a narrow approach to standing under the Fair Housing Act, contrary to the opinions of this Court and Congress' intent.[2]

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[1]The Fair Housing Act, 42 U.S.C. §3601 *et seq.*, is a comprehensive law designed to eliminate discrimination in virtually all aspects of housing rental and sales. The Act makes it unlawful to refuse to negotiate, sell or rent a dwelling on the basis of a person's race, 42 U.S.C. §3604(a); prohibits differentiation in the terms of sale, rental or services provided because of race, 42 U.S.C. §3604(b); prohibits advertising a preference based on race in connection with housing, 42 U.S.C. §3604(c); prohibits falsely telling anyone that a dwelling is not available for inspection, sale or rental because of the person's race, 42 U.S.C. §3604(d); and prohibits "blockbusting," or inducing people to sell because of the threat that members of another race may move into the neighborhood, 42 U.S.C. §3604(e). The Act also addresses certain services related to housing, such as access to multiple listing services, 42 U.S.C. §3606, and availability of financing for the repair or purchase of housing, 42 U.S.C. §3605. Finally, the Act makes it unlawful to interfere with any person who asserts or helps another to assert the rights secured by the Act. 42 U.S.C. §3617.

[2]Congress intended that private enforcement would be the principal mechanism for effectuating the purposes of the Act, and expressly limited the rights of the government. 42 U.S.C. §3613. For private parties, on the other hand, the Act creates a right of civil action with direct access to the courts, 42 U.S.C. §3612, with an opportunity first to attempt conciliation through the intervention of state and federal agencies, 42 U.S.C. §3610. This Court has recognized such intent by interpreting the Act as according standing as broadly as permitted by the Constitution, without regard to judicially imposed prudential limitations.

On January 9, 1979, respondents Paul Coles ("Coles"), Sylvia Coleman ("Coleman"), R. Kent Willis ("Willis") and Housing Opportunities Made Equal ("HOME") filed an action in the United States District Court for the Eastern District of Virginia alleging that petitioners Havens Realty Corporation and one of its employees, Rose Jones (collectively referred to as "Havens"), had engaged in the practice of racial steering in the Richmond area in violation of the Civil Rights Act of 1866, 14 Stat. 27, 42 U.S.C. § 1982 (1977), and the Fair Housing Act of 1968, 82 Stat. 81, 42 U.S.C. § 3601 *et seq.* (1977). Respondent HOME is a Virginia nonprofit membership corporation which provides services to residents of the Richmond area in order to promote and maintain access to housing on a nondiscriminatory basis. Respondents Coleman and Willis were employees of HOME and residents of the Richmond area. Havens Realty Corporation is a Virginia corporation engaged in the sale and rental of housing in the Richmond area. Havens' principal place of business is at two apartment complexes, Camelot Townhouse Apartments and Colonial Court Apartments, in Henrico County, Virginia, just outside the Richmond city line.

Respondents alleged, and the district court later found, that Havens had engaged in a consistent practice of denying and limiting access to housing on the basis of race by lying to blacks who inquired about vacancies in apartments managed by the firm. As evidence of this practice, the complaint described five examples, between March 14, and July 13, 1978, of Havens' discriminatory policy. In each instance Havens had given different information about apartment availability in response to inquiries made by Coles, a black homeseeker who had sought HOME's counseling concerning rental housing,

and by Coleman, a black HOME employee, than it had given to two white HOME employees, Willis and John Barr (Complaint ¶¶ 12, 13; App. 15-17).[3] Respondents alleged that Havens' racial steering practices contributed to existing neighborhood segregation and inhibited the development of stable, racially integrated neighborhoods in the Richmond area (Complaint ¶ 10; App. 14) and that Respondents were injured as a result of Havens' discriminatory practices because they had been denied the benefits of interracial associations (Complaint ¶¶ 12, 14-16; App. 15, 17-18). Respondents sought declaratory and injunctive relief, compensatory and punitive damages and attorneys' fees for themselves and on behalf of a class of all persons who had rented or sought to rent property and who were adversely affected by Havens' racial steering practices (Complaint ¶ 2; App. 12).

On January 31, 1979, Havens filed a combined answer and motion to dismiss all of respondents' claims against Havens, alleging, among other things, that most of respondents' claims were time-barred and that respondents Coleman, Willis and HOME lacked standing to assert claims under the Fair Housing Act of 1968 and the Civil Rights Act of 1866 (App. 21-28). Without benefit of any response from respondents,[4] the district judge dismissed the claims of three of the four plaintiffs, Coleman, Willis and HOME, on the now discredited rule from *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir.),

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[3]All references to App. are references to pages in the Joint Appendix.

[4]Counsel for plaintiffs and defendants had agreed to a four-day extension of the deadline for filing plaintiffs' opposition to the motion to dismiss. Unfortunately, there was an inadvertent failure to secure the court's formal approval of the agreed-upon extension, as required by local rules.

cert. denied, 429 U.S. 859 (1976), that "indirect" victims of racial steering practices do not have standing to assert claims under section 812 of the Fair Housing Act (App. 33-34).[5]

In its memorandum opinion, the district court dismissed all of respondents' claims as time-barred under the 180-day statute of limitations of the Fair Housing Act, 42 U.S.C. § 3612(a), but ruled that none of the claims was time-barred under the two-year statute of limitations applicable to 42 U.S.C. § 1982 (App. 33). The court then stated that HOME was not a proper party, citing, without discussion, *Warth v. Seldin*, 422 U.S. 490 (1975), and *TOPIC v. Circle Realty*, *supra* (App. 33-34). Although the court stated that "no affirmative offer need be shown in order to state a claim" and noted that Coleman and Willis had alleged deprivation of benefits from interracial associations, the court dismissed the claims of Coleman and Willis on the grounds that they had sought only to develop evidence for this lawsuit rather than to attempt in good faith to rent residential property from Havens, that they sought to vindicate the rights of third parties, that Coleman and Willis asserted no more than the general public interest, and that Coleman and Willis failed to allege that, absent Havens' discriminatory practices, Coleman and Willis would reside in integrated communities (App. 34).[6] The

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[5] This Court ruled in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979), that plaintiffs may assert the rights of third parties under 42 U.S.C. § 3612.

[6] Because the first portion of the memorandum opinion dismissed respondents' claims under the Fair Housing Act as time-barred, it is unclear whether the subsequent paragraphs addressing the sufficiency of the respondents' claims were directed solely to § 1982 of the Civil Rights Act of 1866, or whether the district court was also ruling on the sufficiency of the pleadings under the Fair Housing Act of 1968.

district judge cited no cases in support of his conclusion on the insufficiency of the pleadings with respect to Coleman and Willis.

Respondents requested the district court to reconsider its dismissal, noting this Court's imminent decision in *Bellwood* (App. 44-46), and suggested that a decision on the standing of HOME be delayed until after the taking of an already scheduled deposition (App. 51 n.6). This request, however, was also denied (App. 55).

The district court allowed the claims of plaintiff Coles and later certified a class, represented by Coles, of all black persons who may have been injured monetarily by the racial steering practices of Havens on or since January 9, 1977 (corresponding to the 2-year limitations period applicable to the Civil Rights Act of 1866), as well as a subclass of those injured on or since July 13, 1978 (corresponding to the 180-day limitations period applicable to the Fair Housing Act). At a bench trial, the district court found that:

> Havens Realty established a policy of discrimination against black people in the rental of its apartments. This was a policy which was intended to discourage the rental of apartments to blacks. It took the form of being unreceptive to black persons who sought to rent, giving them misinformation or grudgingly giving them correct information, being meticulous in scrutinizing their applications to see if there would be an excuse for turning them down within the guidelines set forth for rental and in general making it more difficult for a black applicant to be successful than a white applicant. This was a conscious and deliberate policy on the part of Havens Realty. . . .
>
> The effect of this discriminatory policy was to violate the provisions of the Fair Housing Act and

to violate the provisions of the Civil Rights Act of 1866.[7]

On February 17, 1981, the court entered a consent order which required Havens to create a fund of $13,500 to pay any class member demonstrating injury as a result of Havens' steering practices; permanently enjoined Havens from violating the terms of the two acts; and ordered Havens to take affirmative action over the next three years to establish rental criteria, advertise apartment availability, collect information from rental applicants and make reports to the Virginia Real Estate Commission on Havens' compliance with the consent order. (*See* Appendix B of this brief.) The consent order did not provide damages for Coleman, Willis or HOME, however, and left intact the district court's denial of standing.[8] Respondents appealed the decision of the

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[7] Findings of Fact of Hon. D. Dortch Warriner, No. 79-0024-R (E.D. Va., Jun. 23, 1980), Appendix at 1a.

[8] It has been suggested that the Court should not reach the merits of this case because the controversy may be moot as a result of the consent order entered in the *Coles* case. Respondents agree that the claims on behalf of HOME members may have been rendered moot by the injunctive relief obtained in that consent order. If so, the petition for writ of certiorari with respect to HOME's representational standing should be dismissed as improvidently granted.

Respondents take serious issue, however, with the position that the other claims in this case also have been rendered moot. The consent order resolves only the claims of "all *plaintiffs*, including those that may hereafter be joined by the court pursuant to the class certification of this action . . ." (emphasis added). None of the respondents here were plaintiffs in *Coles* when the consent order was entered, since the district court had specifically dismissed Coleman, Willis and HOME two years earlier, nor were they parties to the consent order. Moreover, their claims for damages were not covered by the order. Thus, although the consent order may have rendered moot the respondents' claims for injunctive

[footnote continued]

district court denying them standing.[9]

The court of appeals reversed the decision of the district court in its entirety and remanded the case for trial. The court granted standing to Willis and Coleman in their capacity as "testers" on the grounds that the policy expressed in section 804(d) of the Fair Housing Act and in two civil rights cases, *Pierson v. Ray*, 386 U.S. 547 (1967), and *Evers v. Dwyer*, 358 U.S. 202 (1958), creates a right for "bona fide surrogates" to bring cases under the Fair Housing Act on behalf of those illegally denied housing (App. 71-72). Following *Bellwood* and *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S.

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relief, respondents' claims for money damages still remain. It is well established that an outstanding damage claim "supplies the constitutional requirement of a case or controversy," even if other issues presented become moot. *Powell v. McCormack*, 395 U.S. 486, 497 (1969). Indeed, if this Court were to hold that respondents' claims are moot as a result of the consent order, it would imply that respondents have standing to assert their claim, since Coleman, Willis and HOME can only be bound by the consent order if they are considered to be "plaintiffs" or members of the class in *Coles*.

[9]By the time the case was set for argument in the Court of Appeals for the Fourth Circuit, the district judge apparently had second thoughts about his ruling on HOME's standing in light of subsequent rulings of this Court in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), and of the Fifth Circuit in *Broadmoor Improvement Ass'n v. Stan Weber & Assoc., Inc.*, 597 F.2d 568 (5th Cir. 1979). At the judge's request, counsel for respondents moved pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure to vacate that portion of the final judgment concerning HOME. The district court entered a formal request to the court of appeals for a remand of the case to the district court. *See Turner v. A.B. Carter, Inc.*, 85 F.R.D. 360, 363 n.3 (E.D. Va. 1980). The court of appeals considered the question of HOME's standing, however, without first remanding the issue to the district court for reconsideration.

205 (1972), the court held that the allegations are "sufficient to grant standing for each of them as individual plaintiffs" deprived of the benefits of interracial associations (App. 71-72). The court of appeals also held that HOME had standing as a representative of its members, following *Warth v. Seldin*, 422 U.S. 490 (1975), and *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977), and as an injured party on its own behalf, based on *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (App. 75-76). Finally, the court of appeals found that respondents and Havens had a "continued relationship" and that Havens' discriminatory treatment of respondents constituted a continuing violation of the Fair Housing Act. Hence, respondents' claims were not barred by the 180-day statute of limitations of the Fair Housing Act since the violation continued into the limitations period (App. 81).

SUMMARY OF THE ARGUMENT

I

The district court precipitously dismissed the claims of Coleman, Willis and HOME on the basis of the ruling in *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976), since discredited by this Court in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979), that "indirect" victims of discriminatory practices do not have standing under section 812 of the Fair Housing Act. This, by itself, was reversible error. The complaint alleged injury sufficient to accord standing to respondents. Even assuming that the complaint was not sufficient, however, this Court recognized in *Bellwood* that the unique nature of suits

under the Fair Housing Act requires the consideration of special facts, going beyond the usual allegations of the pleadings. The district court in this case dismissed the claims on the basis of the complaint alone without giving respondents an opportunity to supplement the record.

II

Coleman and Willis have standing based on their claim that Havens' racial steering practice deprived them of the benefits of interracial associations, describing their injury and a nexus to defendants' acts in virtually the same terms as did the individual plaintiffs in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), and *Bellwood*. Additionally, Coleman, a black woman, has standing under section 804(d) of the Fair Housing Act to redress her legal and personal injury occasioned by Havens' discriminatory misrepresentations to her concerning the availability of rental housing. The abrupt dismissal of the complaint precluded Coleman and Willis from developing fully the factual basis for allegations sufficient on their face to accord standing.

III

HOME has standing based on its claim of injury to its operations and to its members as a result of Havens' racial steering practices. Unlike the so-called "ideological plaintiffs" dismissed in *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), HOME's primary activity is to provide housing services to large numbers of clients in the Richmond area, some pursuant to contracts with the City of Richmond. Havens' racial steering practices directly and adversely affect HOME's ability to disseminate accurate housing information

needed by its black and white clients. HOME's long-standing involvement in housing counseling is not an abstract concern with fair housing, but provides the "personal stake in the outcome of a controversy" which this Court has held to be the prerequisite for standing. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Further, HOME is a proper representative of its members under the three-part test set forth in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

IV

The complaint alleged that Havens engaged in a policy, pattern and practice of racial steering, describing, as examples, five interconnected incidents over a four-month period between respondents and Havens. Respondents' claims, based on these incidents, are timely under the 180-day statute of limitations in the Fair Housing Act because the practice of racial steering complained of occurred during the limitations period. The continuing violation theory is applicable to this case because at least one of the connected incidents occurred within 180 days of the filing of this action, *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments*, 496 F. Supp. 522 (N.D. Ill. 1980), and because it was brought as a class action alleging a pattern and practice of discrimination, *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977).

ARGUMENT

I.

THE COURT OF APPEALS WAS COMPELLED BY THIS COURT'S DECISION IN *BELLWOOD* TO REVERSE THE DISTRICT COURT'S ERRONEOUS DISMISSAL OF THE COMPLAINT.

A review of the record shows that this case was decided by the district court under an incorrect rule of law and

that the precipitous dismissal of the complaint has thwarted meaningful substantive review by this Court. The district court dismissed the complaint relying on the theory developed in *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976), that "indirect" victims of racial steering do not have standing to sue under section 812 of the Fair Housing Act. Subsequent to the district court's dismissal, this Court held that, in view of the need for strong private enforcement of the Act, "[s]tanding under § 812, like that under § 810, is 'as broa[d] as is permitted by Article III of the Constitution.'" *Bellwood, supra* at 109, *quoting Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). In so holding, this Court rejected the application of prudential limitations to standing under the Act and expressly permitted claims for injury by "indirect" as well as "direct" victims of racial steering. In view of this legal development, the court of appeals was compelled to correct the decision of the district court by reversing and remanding the case.

Respondents claimed that they had been injured as a result of Havens' racial steering practices in violation of the Fair Housing Act. Since facts alleged in the complaint are presumed true and construed liberally in favor of plaintiffs,[10] their claims were sufficient to

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[10]It is well established that a complaint should not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746 (1976); *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969); *Conley v. Gibson*, 355 U.S. 41, 45 (1957). This rule is fundamental to our notice pleading system and is a necessary corollary to Rule 8 of the Federal Rules of Civil Procedure. *Id.* at 48.

withstand a motion to dismiss. Moreover, even assuming that the complaint had been found to be insufficient, it is inappropriate to resolve a standing challenge without allowing the plaintiff to develop key aspects of the complaint, particularly where, as here, respondents requested such an opportunity. This is especially true in the still-evolving legal area of fair housing, where the factual basis which may establish a claim is rooted in the particular geographic and demographic circumstances of a given community.

The following sections of this brief establish that the claims of Coleman, Willis and HOME meet article III requirements for standing. This section compares the record available in this case to those in other standing cases reviewed by this Court. As is made evident by this comparison, the court of appeals correctly remanded the case for further factual development of the claims.

In *Warth v. Seldin*, 422 U.S. 490 (1975), this Court reviewed a standing question "[u]pon consideration of the complaints and of extensive supporting materials submitted [to the trial court] by petitioners." *Id.* at 497. Justice Powell, after observing that "trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party", wrote in favor of the practice that encouraged informed decision-making:

> At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, *after this opportunity*, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

Id. at 501-02 (emphasis added). Similarly, *Trafficante* was decided on a summary judgment motion, on the basis of "voluminous memoranda," 322 F. Supp. 352, 353 (N.D. Cal. 1971).

In this Court's recent decision construing the Fair Housing Act, *Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91 (1979), this Court reviewed a challenge to the standing of the Village of Bellwood and six individuals who alleged injury caused by the racial steering practices of two realtors. In addition to the complaint, the trial court had reviewed admissions, answers to interrogatories, and exhibits prior to disposing of the standing motion. *Id.* at 109 n.22. This Court granted standing to the Village and four of the plaintiffs, based on the complaints "as illuminated by subsequent discovery." *Id.* at 95.[11] The Court affirmed the district court's dismissal of two individual plaintiffs who were not residents of the "target area" because the complaint did not allege injury to plaintiffs who resided outside that area. This Court left open the possibility, however, that given the opportunity to amend their complaint to allege such injury, such allegations would be sufficient to justify standing. *Id.* at 112 n.25. Of particular significance is Justice Powell's observation that in a case under the Fair Housing Act in which a plaintiff alleges deprivation of the benefits of interracial associations, it is necessary to inquire into the nature of the community alleged to have been injured by defendant's actions, the

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[11] For example, the four individual plaintiffs were held to have standing as residents of the "target area". All the *Bellwood* complaint alleged with respect to residence, however, was that plaintiffs "were citizens of the United States of America who reside in Cook County, Illinois." (*Bellwood,* Joint App. 4, 5). The fact that they resided in the target area was established by evidence presented subsequent to the complaint.

nature and extent of a realtor's business and the types of housing involved. *Id.* at 114 and n.29. As Justice Powell wrote:

> Evidence of this kind may be relevant to the establishment of the necessary causal connection between the alleged conduct and the asserted injury. Respondents apparently attempted to discover such information, but summary judgment was entered against them before this was accomplished.

Id. at 114 n.29.

In short, in a Fair Housing Act case where allegations of cognizable injury are made, the complaint should not be dismissed on the pleadings, but rather "[t]he presence of a genuine injury should be ascertained on the basis of discrete facts presented at trial."[12] *Id.* at 114. District courts have followed these guidelines in Fair Housing Act cases by allowing plaintiffs to submit supporting material or make additional allegations in support of their standing.[13]

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[12]Other cases in which this Court reviewed challenges to a plaintiff's standing on a substantial record are *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 67-68 (1978) (standing granted after extensive discovery by both parties and an evidentiary hearing); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 37 (1976) (standing denied on summary judgment motion with supporting affidavits); and *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972) (standing denied after two days of hearings).

[13]*E.g., Heights Community Congress v. Hilltop Realty Inc.*, No. C-79-422 (N.D. Ohio, Dec. 31, 1980) (decision on summary judgment motion on standing issue taken after depositions, interrogatories and production of documents); *Sherman Park Community Ass'n v. Wauwatosa Realty Co.*, 486 F. Supp. 838, 842 (E.D. Wis. 1980) (action on defendant's motion for judgment on the

[footnote continued]

The complaint in this case alleges a cognizable injury to respondents resulting from Havens' racial steering practices and requests injunctive and monetary relief to redress that injury. This complaint is not fundamentally flawed and its dismissal was not appropriate.[14] *Bellwood* teaches that critical components of claims under the Fair Housing Act may not be susceptible to resolution on the pleadings, 441 U.S. at 114. Information about the size and nature of defendant's operation, a necessary aspect of the trial court's standing inquiry

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pleadings taken after complaint had been amended, interrogatories and brief were made available to the court); *Huertas v. East River Housing Corp.*, 81 F.R.D. 641, 644-45 (S.D.N.Y. 1979) (motion to dismiss denied on the basis of plaintiffs' affidavits and briefs from both parties); *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F. Supp. 486, 488-89 and n.2 (E.D.N.Y. 1977) (plaintiffs' motion for judgment on the pleadings denied after court received plaintiffs' affidavits and *amicus curiae* brief of Department of Justice).

[14]This Court has on several occasions affirmed a district court's dismissal of a complaint for lack of standing based only on the complaint. However, these cases, none of which concerned fair housing, involved complaints that were structurally defective. That is, they lacked one of the three requisite components of a colorable claim: (1) allegation of judicially cognizable injury to plaintiff; (2) caused by defendant's acts or omissions; (3) which is likely to be remedied by the requested judicial intervention. *O'Shea v. Littleton*, 414 U.S. 488, 493 (1974) (complaint failed to allege an actual injury to plaintiffs). In *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), *United States v. Richardson*, 418 U.S. 166, 174-75 (1974) and *Linda R.S. v. Richard D.*, 410 U.S. 614, 618 (1973), the complaints alleged no nexus between the claimed injury and the challenged government action. These cases evidence that, in the context of standing motions, this Court has upheld district courts' dismissals of complaints on the pleadings only when the chain of causation alleged in the complaint is so flawed it is clear that, even liberally construing the complaint, *no* set of facts could be adduced that would prove a claim.

since *Bellwood*, is often available to a plaintiff only through the discovery process. *Id.* at 114 n.29. Similarly, development of the facts alleged in the complaint can assist a trial judge to better evaluate whether a plaintiff has actually been injured by defendant's actions.[15] Judge Sprouse, writing for the Fourth Circuit, recognized this by observing that *Bellwood* contemplated the opportunity to develop the "nexus" between Havens' discriminatory acts and the "area" where Coleman and Willis reside either by amendment to the complaint or proof at trial (App. 77-78).

There is a clear parallel between the case at bar and *Bellwood*. As in this case (App. 34), the district court in *Bellwood* relied on *TOPIC v. Circle Realty*, 532 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976), and applied the wrong legal standard to dispose of plaintiffs' claim on the ground that section 812 of the Fair Housing Act did not contemplate suits by "indirect" victims of discrimination. *Bellwood*, 441 U.S. at 96. Thus, if this Court affirms, the district court on remand will have the opportunity to reconsider whether respondents Coleman, Willis and HOME have standing under the standards set out in *Bellwood*. *Accord, Broadmoor Improvement Ass'n v. Stan Weber & Assoc., Inc.*, 597 F.2d 568 (5th Cir. 1979).

The fundamental pleading rule that underlies analysis of a complaint—that trial and reviewing courts must accept as true the plaintiffs' allegations and construe the complaint in their favor—requires as a matter of fair and efficient judicial administration that plaintiffs

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[15] For example, in the present case the trial court could have brought the standing issue into clearer focus by noting the location and type of housing in which Coleman and Willis lived in relation to the location and type of housing owned by Havens.

be allowed to support such allegations or, if necessary, amend the complaint. The wisdom of this rule is clearly evidenced in this case where the parties and the judiciary have spent two and one-half years reviewing the district court's hasty dismissal of respondents' complaint five weeks after it was filed. The peculiar circumstances of this case, in which one plaintiff's claim continued to trial on the merits and to a judicial determination that defendant engaged in a "conscious and deliberate . . . discriminatory policy" in violation of the Fair Housing Act and the Civil Rights Act of 1866, show that what, at first glance, may appear to be a rigorous judicial attempt to weed out frivolous claims, may instead be a judicial failure to hear and redress real claims for injuries to rights created by Congress.

II.

PLAINTIFFS-RESPONDENTS COLEMAN AND WILLIS HAVE STANDING UNDER THE FAIR HOUSING ACT BECAUSE THEY HAVE ALLEGED INJURY TO THEMSELVES AS A RESULT OF HAVENS' UNLAWFUL RACIAL STEERING PRACTICES.

Coleman and Willis alleged that Havens' practices impeded the integration of their communities, depriving them of the benefits of interracial associations (Complaint ¶¶ 14, 15; App. 17). Coleman also claimed that she personally was injured by Havens' repeated illegal efforts to steer her away from certain apartment buildings because of her race (Complaint ¶ 17-18; App. 18-20). The district court dismissed their claims on the ground that their action was an effort to vindicate the rights of third parties and also denied Coleman standing for her claim of personal injury because it had been inflicted while she was employed in her capacity as a tester (App. 34). The court of appeals reversed, holding that Coleman

and Willis had standing both as "bona fide surrogates" of individuals who have been illegally denied housing and as persons claiming deprivation of the benefits of interracial associations.[16]

Respondents Coleman and Willis have standing to sue because their claims meet the requirements of article III of the Constitution: they have alleged "a distinct and palpable injury" resulting from Havens' unlawful racial steering practices. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). The court of appeals' decision reversing the district court and remanding the case to allow Coleman and Willis to proceed with their claims should be affirmed.

A. Coleman And Willis Have Standing To Sue Under *Bellwood* Because They Have Alleged That Havens' Racial Steering Practices Have Deprived Them Of Their Right To The Benefits Of Interracial Associations

Coleman and Willis alleged that, as a result of Havens' discriminatory racial steering practices, they have been deprived of "the right to the important social, profes-

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[16] Distinctions between "testers" and individuals who actually intend to rent or purchase property are relevant only to claims under subsection (a) of § 804 of the Fair Housing Act. This section requires that a "bona fide offer" have been made before a refusal to rent or sell is deemed to be a violation of the Act. The claims of plaintiffs Coleman and Willis arose under subsection (d) of § 804 of the Fair Housing Act. There is a clear distinction in the statutory language between § 804(a), which requires a bona fide offer, and § 804(d), which does not. Indeed, the legislative history confirms that the requirement of a bona fide offer applies only to the first clause of § 804(a). 114 *Cong. Rec.* 5515 (1968). The designation of Coleman and Willis as "tester plaintiffs" in some of respondents' papers filed in this case was intended only as a means of distinguishing them from plaintiff Paul Coles, who was a bona fide homeseeker.

sional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." (Complaint ¶¶ 14, 15; App. 17). This Court has held such injury "sufficient to satisfy the constitutional standing requirement of actual or threatened harm." *Bellwood*, 441 U.S. at 112, *citing Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 210 (1972).

Since the district judge believed that claims of deprivation of interracial associations were not cognizable under the Fair Housing Act,[17] he did not consider whether the complaint was adequate in this regard. Willis' and Coleman's allegations, however, were sufficient to inform a court and the defendants of the alleged violation and the claimed injury.[18] As the court of appeals noted,

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[17]The district court reasoned that:

> Their action seeks to vindicate the rights of third parties dispite [sic] their allegations of deprivation of benefits from interracial associations. Coleman and Willis assert no more than the general public interest. [App. 34]

[18]"[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' [citation omitted] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). In this case, Willis and Coleman alleged that the Richmond area, including Henrico County, has racially segregated housing patterns; that Havens' discriminatory racial steering practices in that county have created a dual housing market in Henrico County and contributed to the creation and maintenance of racially segregated housing patterns and inhibited the development of racially stable neighborhoods in the Richmond area; and that these actions have injured Willis and Coleman, who are residents of the affected area. (Complaint ¶¶ 7, 10, 14, 15, 17, 18; App. 13, 14, 17, 18).

"Coleman and Willis both claim deprivation of community rights in language at least as specific as approved [in *Trafficante* and *Bellwood*]" (App. 72).

In *Trafficante*, this Court recognized standing of two residents of a large apartment complex in San Francisco who alleged that the racial steering practices of the owner had confined them to living in a "white ghetto." *Id.* at 208. In *Bellwood*, this Court recognized standing of four individuals who resided within the area alleged to have been "targeted" by defendants for conversion from a stable integrated neighborhood to a racially segregated black neighborhood. The Court did not express an opinion as to whether residents outside the target area had standing because the complaint did not claim that they had been injured by the defendants' racial steering practices. *Bellwood, supra* at 111-15. In contrast to the complaint in *Bellwood*, the complaint in this case specifically alleged that Havens' discriminatory practices were distorting the housing market throughout the Richmond area.

Petitioners argue that the complaint failed to allege a sufficient causal nexus between the respondents' injury and Havens' acts because such acts "cannot reasonably be said to affect the entire Richmond Metropolitan Area" (Petitioners' Brief [hereinafter "Pet. Br."] 31). However, the affected area should not be defined by artificial boundaries, but rather determined "according to how one views his living environment." *Id.* at 113. In the view of officials with expert knowledge of such

matters, housing discrimination in one part of the Richmond community affects neighborhoods in other parts of the community.[19] *See* Brief of *amicus curiae* City of Richmond at 5, 15-16. This is a factual matter not determinable on the basis of pleadings alone.[20] Coleman and Willis should be allowed to prove, after an opportunity to conduct relevant discovery, that

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[19]Coleman and Willis both reside in moderate income neighborhoods in Richmond in the area north of the James River. The apartment complexes managed by Havens serve the same housing market as homes and apartments near the residences of Coleman and Willis. Richmond is a unified metropolitan area with a low vacancy rate that is significantly smaller than the Chicago metropolitan area involved in *Bellwood*. There are a limited number of neighborhoods in which residents can seek convenient, moderate income housing. The refusal of Havens and other landlords in certain areas of Richmond to make moderate income housing available to blacks has produced a sharp increase in the black population in other neighborhoods that serve the same market, such as that of Coleman and Willis.

Thus, unlike the cases relied upon by petitioners, *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973), and *Warth v. Seldin*, 422 U.S. 490, 508 (1975), in which there was no connection whatsoever between the act complained of and the injury to the plaintiff, in this case Havens' steering practices are a contributing factor to the segregation which has deprived respondents of the benefits of interracial associations.

[20]For example, as mentioned above, the complaint in *Bellwood* alleged only that the plaintiffs resided in Cook County, Illinois. The "target area" in which defendant, Gladstone Realtors, was engaged in unlawful racial steering practices was described in a separate paragraph which made no reference to any of the *Bellwood* plaintiffs. Thus, the complaint in *Bellwood* described no "causal nexus" between the alleged injury to the plaintiffs and the defendant's racial steering practices. That "causal nexus" was provided by pre-trial discovery.

segregation in their neighborhoods is causally related to Havens' racial steering practices.

Havens also argues that by granting standing to Coleman and Willis, the court of appeals conferred standing on all residents of Richmond and Henrico County to sue for damages caused by defendants' discriminatory practices (Pet. Br. 30). Contrary to this contention, the court of appeals held only that the district court's dismissal of the complaint on the pleadings, without giving respondents an opportunity to develop the facts to support their allegation of injury, was improper. This Court has recognized that:

> Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial.

Bellwood, 441 U.S. at 115 n.31. The court of appeals' holding closely followed the guidance of this Court in *Bellwood* on this matter.[21]

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[21] In Part IV of its opinion, the court of appeals stated:

> The district court's dismissal prevented plaintiffs Coleman, Willis and HOME from proceeding to trial. Since allegations bearing on standing must be actualized by proof, the defendants may, on remand, contest these as any other facts. The complaint in the instant case does not specifically allege that the discrimination practiced at Colonial Courts and Camelot Townhouse Apartments affects the area where the testers reside. The district court may require the complaint

[footnote continued]

In light of the fact that respondents' complaints were filed (and dismissed by the district court) before this Court's decision in *Bellwood* clarified the facts that must be alleged to establish standing for loss of the benefits of interracial associations, it is particularly appropriate to permit respondents to present additional materials and, if necessary, amend their complaint.[22] In spite of this, the district court denied respondents' motion to reconsider.

In seeking to uphold the district court's dismissal of respondents' complaint, petitioners are asking this Court to reverse its consistent functional treatment of standing in fair housing cases. Petitioners in this case have sought to impose their own rigid geographical standard to describe the Richmond area affected by Havens' practices rather than allow respondents to demonstrate that racial discrimination in one part of the area can affect neighborhoods in other parts of the overall community.[23]

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to be amended for such allegation necessary to facilitate production of evidence bearing on this issue. If the allegations are not supported by proof at trial, the case may be terminated for lack of standing at an appropriate stage of the trial. [App. 78.]

[22]Petitioners' suggestion that respondents should have pleaded facts that tracked the *Bellwood* guidelines is, of course, an exercise in hindsight. If, however, petitioners would prefer to deal with such allegations, they, presumably, would not object to a determination that respondents be granted leave to amend their complaint.

[23]This should be contrasted with *Trafficante*, 409 U.S. 205 (1972), and *Bellwood*, where for the purpose of determining the standing of plaintiffs this Court accepted the relevant community to be the one alleged *by plaintiffs* to have been affected by the defendants' practices.

In *Trafficante* and *Bellwood*, this Court declined to adopt the sort of rigid geographical rule petitioners now urge the Court to accept. Geographic nexus is one factor in such determinations, but injury, not proximity, is the touchstone of standing. Respondents urge the Court to affirm the decision of the court of appeals and, with any guidance or special instructions this Court is willing to provide, to remand to the district court for further factual development of the claims in question.

B. Coleman Has Standing To Sue Because She Has Been Denied The Right To Obtain Unbiased Housing Information Secured By Section 804(d) Of The Fair Housing Act.

Coleman, a black woman, alleged that each time she requested information regarding rental housing, Havens gave her different information than it gave respondent Willis, a white man (Complaint ¶ 13; App. 16-17). On three occasions, Coleman was told that there were no vacancies in either Camelot Townhouses or Colonial Court, the two apartment complexes owned and operated by Havens, while Willis was informed of vacancies in both complexes. In response to a fourth inquiry, Havens informed Coleman that there was a vacancy at Colonial Court, the partially integrated apartment complex, but none at Camelot Townhouses, the all-white complex. On the same day, another white HOME employee was informed by Havens that there were vacancies in the Camelot complex.

On its face the complaint describes a claim that Havens represented to Coleman, because of her race, that Havens' apartments were not available for rental when, in

fact, they were so available. (Complaint ¶ 13; App. 16). This makes out a violation of section 804(d) of the Fair Housing Act.[24] Coleman alleged that she suffered "specific injury" as a result of these acts (Complaint ¶ 13; App. 16).

The district court dismissed Coleman's complaint because she was a "tester" rather than a "bona fide renter," stating that she "did not attempt in good faith to rent residential property from any defendant, but instead sought only to develop evidence for use in this lawsuit." (App. 34).[25] The court of appeals reversed, holding that the prohibition against providing false information in section 804(d) of the Fair Housing Act "creates a concomitant right to receive correct housing information without regard to race or color" and that plaintiff's status as a "tester" does not preclude her from bringing an action for a violation of her civil rights (App. 70-71).

This Court has consistently upheld the position taken by the court of appeals that a plaintiff's motive for "testing" conduct which violates his or her civil rights is

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[24] 42 U.S.C. § 3604 provides that:

> As made applicable by Section 3603 of this title and except as exempted by Sections 3603(b) and 3607 of this title, it shall be unlawful –
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> * * *
>
> (d) to represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

[25] However, in the following paragraph the district court stated: "[t]he gravamen of plaintiffs' complaint is that when black persons inquired as to vacancies, they were told that none existed. Under these circumstances, no affirmative offer to rent need be shown in order to state a claim." [App. 34.]

irrelevant to the question of standing. *Pierson v. Ray*, 386 U.S. 547, 558 (1967); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958). *Accord, Grant v. Smith*, 574 F.2d 252 (5th Cir. 1978). What is significant is that such person's rights have been violated and an injury has been caused by the defendant. Coleman met the requirements for standing set down in *Warth v. Seldin*, 422 U.S. 490, 501 (1975): she alleged a violation of a right and a distinct injury to herself resulting from that violation. She should have been allowed to proceed to trial to prove the facts on which her claim was based.

Petitioners argue that Coleman was not injured by Havens' discrimination (Pet. Br. 25). This is a factual issue that should be decided at trial.[26] Petitioners' suggestion, however, that blacks who are lied to because of their race when they seek housing information suffer no personal injury or insult contradicts the congressional intent behind the Fair Housing Act—and makes painfully clear the continuing need for courts to safeguard these personal rights. The legislative history of the Fair Housing Act shows Congress' intent to eliminate "the opportunity to insult and discriminate against a fellow American because of his color." 114 *Cong. Rec.* 5643

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[26]Havens' biased treatment of Coleman was no different from the way Havens treated Paul Coles. In his Findings of Fact following the trial of Coles' racial discrimination claim against Havens, the district judge concluded that it was reasonable to infer from such circumstances that a victim of Havens' discrimination could reasonably have been outraged at such treatment:

> Indeed, I can imagine that he [Coles] was mad when he learned that he had been discriminated against because of his race, contrary to the laws of the land and contrary to decency. How does one put a price on being hurt and mad?

Findings of Fact, n.7, *supra*. *Accord, Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977); *Seaton v. Sky Realty Co.*, 491 F.2d 631, 634 (7th Cir. 1974).

(1968).[27] This Court, like Congress, has recognized that the embarrassment, insult and humiliation individuals suffer when they are the victims of overt racist actions constitute legally cognizable injuries. In *Curtis v. Loether*, 415 U.S. 189 (1974), a case which also arose under section 812 of the Fair Housing Act, this Court drew an analogy between racial discrimination and the tort of intentional infliction of emotional harm:

> An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." C. Gregory and H. Kalven, Cases and Materials on Torts 961 (2d Ed. 1969).

Id. at 195 n.10.

In short, Coleman's complaint asserts a legally cognizable claim resulting from Havens' discriminatory treatment of her in violation of section 804(d) of the Fair Housing Act. At trial, the specific facts of the case in question would have established the extent of her personal injury. The fact that she performed "testing" as part of her activities as a HOME employee does not disqualify her from bringing her claim of injury. As this Court held in *Pierson* and *Evers*, her motive is irrelevant to the question of standing.

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[27]Senator Hart emphasized the need for flexible remedies "to redress specific wrongs aimed at [blacks] because of the color of their skin." 114 *Cong. Rec.* 5514-15 (1968).

III.

PLAINTIFF-RESPONDENT HOME HAS STANDING UNDER THE FAIR HOUSING ACT BECAUSE IT HAS ALLEGED INJURY TO ITSELF AND TO ITS MEMBERS AS A RESULT OF HAVENS' UNLAWFUL RACIAL STEERING PRACTICES.

HOME alleged that it is a nonprofit corporation with a multiracial membership of 600 individuals whose purpose is "to make equal opportunity in housing a reality in the Richmond Metropolitan Area." (Complaint ¶ 8; App. 13). To achieve this purpose, HOME engages in various specific programs in the Richmond area. HOME alleged that it:

> has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services. Plaintiff HOME has had to devote significant resources to identify and counteract the defendants' racially discriminatory steering practices. HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices. . . .

(Complaint ¶ 16; App. 17-18).

In addition to declaratory and injunctive relief, HOME requested "expenses of testing and monitoring defendants' practices and its expenses pursuant to this litigation." (Complaint ¶ 18(f); App. 20).

The district court dismissed HOME's complaint, stating that "the law is clear that HOME is not a proper party to this action and cannot be accorded any relief by this Court", citing *Warth v. Seldin*, 422 U.S. 490 (1975), and *TOPIC v. Circle Realty*, 532 F.2d 1273

(9th Cir.), *cert. denied*, 429 U.S. 859 (1976). The court did not discuss the law in those cases or apply it to the allegations of HOME's complaint. The Court of Appeals for the Fourth Circuit reversed, holding that HOME had standing to sue on its own behalf and on behalf of its members (App. 75-76).

"There is no question that an association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy," or that "an association may have standing, solely as the representative of its members." *Warth, supra* at 511. HOME has standing in the present action in both respects. HOME's allegations regarding its activities indicate that its interest in the controversy is more than an abstract concern with the issue of fair housing. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). By alleging injury to its own operations and to its members' enjoyment of interracial associations, HOME has "'alleged such a personal stake in the outcome of the controversy' as to warrant [*its*] invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Warth, supra* at 498-499, *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis in original).

A. HOME Has Standing Under The Fair Housing Act Because It Alleged A Distinct Injury To Itself, Resulting From Havens' Racial Steering Practices.

HOME is a counseling agency for low and moderate income families which has been in existence in Richmond since 1971. HOME has been under contract with the

City of Richmond to operate a low-cost rental housing locator service. The performance standards of the 1977-78 contract required HOME to identify at least 30 low-cost housing vacancies per month within the Richmond Standard Metropolitan Statistical Area and to provide counseling services to a minimum of 600 Richmond area residents during the year. In reports to the U.S. Department of Housing and Urban Development, jointly prepared by HOME and the City of Richmond, the extensive counseling and locator services provided by HOME during 1978 and 1979 are fully documented.[28] In addition to advising clients, HOME publishes a "Renter's Guide" listing 44,000 apartments in the Richmond area, contracts with companies in the area to provide housing information to their employees,[29] disseminates housing information to public agencies, churches and schools, and publicizes through the various news media and educational seminars the principles of fair housing.[30] These activities amply demonstrate that HOME is not an "ideological plaintiff" with only an abstract concern with housing discrimination" (Pet. Br.

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[28]The reports show that, during 1978, HOME counseled approximately 100 persons each month, 87% of whom were minorities and 63% of whom were able to find housing in integrated neighborhoods. In 1979, HOME provided assistance to 1206 individuals and families.

[29]Best Products Co., C&P Telephone Co., Reynolds Metals Co., United Virginia Bankshares, Inc., Wards Co., Inc.

[30]These are specific examples of the allegations in the complaint describing HOME's activities. Many of these facts were not part of the record before the district court due to the dismissal of HOME's claim. The existence of HOME's contract with the City, however, is a matter of public record, contained in Richmond City Council Ordinance No. 77-58-69. *See* Brief of *amicus curiae* City of Richmond.

21-22). The City of Richmond, recognizing that the city itself is harmed by racial discrimination in housing,[31] entered into a contract with HOME for the purpose of providing services to Richmond residents to counteract and compensate for the discriminatory practices of landlords and realtors. In this respect, HOME became the agent of the City of Richmond for fair housing matters. *See* Brief of *amicus curiae* City of Richmond.

Petitioners rely on cases in which the result has been the denial of standing to the plaintiff organizations. (Pet. Br. 18-22). The courts' analysis in those cases, however, leads to a contrary conclusion when applied to the functional characteristics of HOME. In *Sierra Club v. Morton,* 405 U.S. 727 (1972), a plaintiff organization devoted to advancing a generalized issue of national interest and scope was denied standing. The Sierra Club expressly disavowed any allegation of injury to the organization itself, claiming only a special interest in the conservation and sound maintenance of the national parks and the Sierra Nevada Mountains. *Id.* at 737 n.8. Nor did the Sierra Club allege that any of its members was injured. HOME, on the other hand, has alleged injury to itself and to its members. (Complaint ¶ 16; App. 17-18).

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[31] In *Bellwood,* 441 U.S. 91 (1979), this Court noted several injuries to a municipality as a result of racial steering: diminution of the tax base, hampering the municipality's "ability to bear the cost of local government and to provide services," *id.* at 110-11, and linkage between housing segregation and school segregation. *Id.* at 111 n.24.

Similarly, in the court of appeals' decision in *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), *aff'd on other grounds, Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979),[32] the plaintiff organization, the Leadership Council for Metropolitan Open Communities, was held not to have standing because of its generalized interest in fair housing. The Leadership Council is an umbrella organization composed of fair housing organizations, some of which are similar to HOME. The Leadership Council's activities did not include the provision of counseling or information services to individual renters or home buyers. *See* Brief of *amicus curiae* Leadership Council for Metropolitan Open Communities. The Leadership Council's complaint alleged only that it was a "not-for-profit corporation charged with providing for equal opportunity in housing and the elimination of discrimination in the six-county Chicago metropolitan area." (*Bellwood*, Joint App. 4). Thus, its allegation of interference with its work and purpose as a result of defendants' racial steering was no more specific than the Sierra Club's allegation that its general interests were aggrieved. HOME, on the other hand, has alleged that it is a service organization whose counseling and referral activities were impaired by Havens' discriminatory practices (Complaint ¶¶ 8, 16; App. 13-14, 17-18).[33] When an organization has alleged injury to itself and has a personal stake in the outcome of a controversy, it has standing to bring suit on its own behalf. *Village of Arlington Heights v. Metropolitan*

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[32]The claim of injury to the plaintiff organization was not before the Supreme Court in *Bellwood*.

[33]Petitioners also cite *Mulqueeny v. National Comm'n on the Observance of International Women's Year, 1975*, 549 F.2d 1115, 1121 (7th Cir. 1977), and *City of Chicago Heights v. Arquilla-DeHaan Realtors, Inc.*, No. 77-C-3305 (N.D. Ill., May 21, 1980),

[footnote continued]

Housing Development Corp., 429 U.S. 252, 261-62 (1977).

Havens' practice of racial steering has caused injury to HOME. Havens willfully violated section 804(d) of the Fair Housing Act, which makes it unlawful to provide racially biased housing information "to any person." 42 U.S.C. § 3604(d). As a "person" under the Act within the meaning of section 802(d), HOME had a right to receive accurate information about housing availability. *McDonald v. Verble*, 622 F.2d 1227, 1233 (6th Cir. 1980); *United States v. Long*, Eq. Opp. Hsg. Rptr. (P-H) ¶ 13,631 at 41,091 (D.S.C. 1972), *modified as to relief and aff'd*, Eq. Opp. Hsg. Rptr. (P-H) ¶ 13,733 (4th Cir. 1974); *United States v. Reddoch*, Eq. Opp. Hsg. Rptr. (P-H) ¶ 13,569 at 13,777 (S.D. Ala. 1972). The violation of this right, without more, caused HOME to suffer a legal injury, since "Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute." *Warth v. Seldin*, 422 U.S. at 514.

However, HOME has suffered not only legal injury but also actual injury. Havens' illegal racial steering practices undermined HOME's ability to perform its normal and lawful activities of counseling and locating housing for

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in support of their contention that HOME is nothing more than a "concerned bystander." *United States v. SCRAP*, 412 U.S. 669, 687 (1973). However, these cases do not support petitioners' case. In *Mulqueeny*, the plaintiffs were not engaged in the provision of direct services as is HOME, but simply participated in a political controversy. In *Chicago Heights*, a nonprofit corporation sought redress of social and economic injury to its members, and not to the organization itself.

low and moderate income homeseekers. Havens also interfered with HOME's ability to perform its contractual obligations to private companies, to meet the stated performance standards in its contract with the City of Richmond and to provide effective services to black clients who sought HOME's counseling services.[34] In order to compensate for the misinformation it received from Havens, HOME was forced to employ its white staff in duplicative efforts in order to determine whether the information given by Havens to HOME's black staff was accurate and complete. In its request for expenses of testing and monitoring Havens' practices (Complaint ¶ 18(e); App. 20), HOME seeks compensation for funds diverted from its operating budget for counseling activities, not for funds spent in furthering its general interest in fair housing.

In order to accord standing, however, HOME's injury need not be translated solely into economic terms. It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing. *United States v. SCRAP*, 412 U.S. 669, 686-87 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972); *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970). HOME's specific project of providing counseling to homeseekers, "whether or not it will generate profits, provides that 'essential dimension of specificity' that informs judicial decision-making." *Village of Arlington Heights v. Metropolitan Housing*

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[34]HOME's injury in this regard can be analogized to an injury resulting from tortious interference with contractual relations. *See generally Blockman v. Sandalwood Apartments*, 613 F.2d 169, 171 (7th Cir. 1980); Restatement (Second) of Torts § 766A (1979) (cause of action exists where performance under contract is made more burdensome as a result of defendants' acts).

Development Corp., 429 U.S. at 263, *citing Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 221 (1974).

This Court has never considered an organization's standing to sue on its own behalf under the Fair Housing Act. Other courts, however, have accorded standing to organizations like HOME or indicated that such a finding would be appropriate, recognizing that standing for an organization seeking redress of its own injury depends on the nature of the organization's activities and not on financial loss.

In *Heights Community Congress v. Hilltop Realty, Inc.*, No. C-79-422 (N.D. Ohio, Dec. 31, 1980), the court found that in contrast to the Leadership Council's general interest in fair housing in *Bellwood*, the Heights Community Congress had standing by virtue of its contractual relationship and joint efforts with the City of Cleveland Heights. The Heights Community Congress, pursuant to these contracts, conducted audits of housing availability and performed escorting services for prospective residents (Supplement to Petition for Writ of Certiorari at 18). HOME not only performed similar services for the City of Richmond, but in addition had the contractual obligation to meet stated performance standards for rental housing placement and counseling.

In *Huertas v. East River Housing Corp.*, 81 F.R.D. 641 (S.D.N.Y. 1979), the court had before it a motion to dismiss two community organizations seeking to maintain a fair housing action. One of the plaintiff organizations was a nonprofit corporation established for the purpose of assisting low income persons in locating housing through, among other activities, advertising housing availability and counseling housing applicants on rental procedures. *Id.* at 644. The court granted standing to the organizations based on representation of

their members, but noted the impact of an organization's activities on standing to sue on its own behalf under the guidelines set forth in *Sierra Club*:

> The existence of a "financial nexus" between the wrong alleged and harm to the organization is certainly sufficient to create standing .... But such a nexus surely cannot be a necessary prerequisite. In the context of the instant case, *there is no doubt that the organizational plaintiffs would have standing if they acted as paid referral agencies for low-income apartment seekers and lost profits because of racial discrimination in housing. The fact that the organizations provide identical services but do so without charge should not affect their claim to standing.* The touchstone should not be remuneration, then, but rather the nature of the organization's function. If it merely monitors and perhaps publicizes a problem, it suffers no injury in fact when the problem worsens. *If, however, the organization takes an active role in combating a social ill, by, for example, the provision of services to clients, it may suffer injury in fact when relevant laws are violated, regardless of whether the organization is motivated by the desire for profit or by social conscience.*

Id. at 652-53 n.16 (emphasis added).

Like the organizational plaintiff in *Huertas*, HOME's active operations suffered injury in fact when its counseling services were hampered by Havens' racial steering practices. HOME has alleged that Havens frustrated HOME's activities in assisting homeseekers through counseling and other referral services (Complaint ¶ 16; App. 17).

In short, HOME is asserting both its own legal right under the Act to receive accurate information regarding

the availability of rental housing and, in accordance with the broad standing powers conferred by the Fair Housing Act, the legal rights of the City of Richmond and of HOME's clients. But the injury which HOME seeks to redress is its own: the frustration of HOME's counseling activities and interference with HOME's efforts to provide the services that it has contracted to perform. Any other reading of the standing requirements of article III in conjunction with the Fair Housing Act would eviscerate the enforcement mechanisms intended by Congress.

B. HOME Has Standing As A Representative Of Its Members Who Are Alleged To Have Been Injured As A Result Of Havens' Racial Steering Practices.

The court of appeals held that HOME has standing under the Fair Housing Act as a representative of its members (App. 75-76).[35] It is now well established that an organization has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). HOME fully meets this three-part test.

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[35]As discussed in n.8 *supra*, the Court may not need to reach this issue.

The first component of the test is met in this case because HOME members have standing to sue on their own behalf. The complaint identifies HOME as a nonprofit organization with a multiracial membership of 600 individuals whose purpose is "to make equal opportunity in housing a reality in the Richmond Metropolitan Area." The complaint further alleges that "HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices" (Complaint ¶ 16; App. 17-18), a cognizable injury under the Fair Housing Act. *See Trafficante*, 409 U.S. at 210; *Bellwood*, 441 U.S. at 112. In the procedural posture of this case, it is too early to contend, as Havens does (Pet. Br. 13-14), that these allegations are insufficient to establish the causal nexus that serves as a basis for HOME's representational standing.[36]

To meet the first part of the *Hunt* test for representational standing, only one member of an organization need suffer injury. *Warth v. Seldin*, 422 U.S. at 511. The complaint in this case alleged injury to HOME members. The dismissal by the district court, however, prevented a determination of the number and identity of HOME members so injured.[37] These facts are

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[36] *See* the discussion *supra* at 19-26 on the claims of Willis and Coleman based on their deprivation of the benefits of interracial associations.

[37] In fact, at the time that the complaint was filed in the present action, one HOME member was a resident of Camelot Townhouses and nine others resided within the two census tracts in which Camelot Townhouses and Colonial Court are located. Numerous

[footnote continued]

appropriately developed in discovery and at trial.[38] Since the complaint in this case indicated that HOME members in the Richmond area have suffered injury as a result of Havens' practices, the first part of the *Hunt* test is met.

The second part of the *Hunt* test is easily met in this case: the interests of HOME members that HOME seeks to protect are virtually identical to HOME's stated purposes. As the representative of its members, HOME is protecting the rights of its members to enjoy the benefits of living in integrated communities.[39] This is clearly germane to HOME's goal of securing "the elimination of unlawful racially discriminatory housing practices that cause injury to its members . . . and . . . [of assuring] to all such persons the right to the important social, professional, business, economic and political benefits of interracial associations that arise from living in integrated communities." (Complaint ¶ 8; App. 13).

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others lived in neighborhoods which are part of the same housing market as Havens' apartments and, hence, were affected by Havens' discriminatory practices.

[38]*See Sherman Park Community Ass'n v. Wauwatosa Realty Co.*, 486 F. Supp. 838, 842 (E.D. Wisc. 1980) (standing granted to members residing within service area identified subsequent to complaint in interrogatories); *Huertas v. East River Housing Corp.*, 81 F.R.D. 641, 648-49 (S.D.N.Y. 1979) (representational standing granted on basis of affidavits of members claiming discriminatory denial of opportunity to buy housing); *Fair Housing Council, Inc. v. Eastern Bergen County Multiple Listing Service, Inc.*, 422 F. Supp. 1071, 1074-75 (D.N.J. 1976) (representational standing granted based on allegation that defendants' pervasive steering policies had caused racial segregation throughout Bergen County; number of members residing in Bergen County not specified).

[39]Thus, there is no "double *jus tertii*" as petitioners contend (Pet. Br. 17) since, for purposes of representational standing, HOME stands in the shoes of its members.

HOME also satisfies the third criterion of representational standing in that the participation of individual members is not essential to the lawsuit. HOME is not seeking damages for its members,[40] a remedy which would require proof as to the fact and extent of injury to each member.[41] *Warth*, 422 U.S. at 515-16. Rather, since HOME is seeking injunctive relief, "it can reasonably be supposed that the remedy, if granted, will insure to the benefit of those members of the association actually injured." *Id.* at 515.

HOME's complaint alleges that cognizable interests of HOME members have been injured by Havens' racial steering practices. The law is well settled that an organization like HOME can bring suit on behalf of its members.

IV.

PLAINTIFFS-RESPONDENTS' CLAIMS UNDER THE FAIR HOUSING ACT WERE TIMELY FILED.

The complaint alleged that Havens had a policy and practice of racial steering, as evidenced by incidents occurring on March 14, March 21, March 23, July 6 and July 13, 1978 (Complaint ¶¶ 12, 13; App. 15-16). The district court held that all claims except the one based on the last incident were time-barred under the Fair Housing Act.[42]

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[40]The damages HOME requests are to compensate its own injury and not to redress injury to specific individual members. (Complaint ¶ 18(f); App. 20).

[41]The court of appeals limited HOME's representational standing to exclude "individual [member] claims for damages where both the fact and extent of injury would require individualized proof." (App. 75 n.4).

[42]The district court held that none of the claims were time-barred under § 1982 (App. 33). Thus, even if this Court were to

[footnote continued]

The court of appeals, reversing the decision of the district court, held that none of the claims in the complaint was time-barred under the Fair Housing Act because the acts of discrimination alleged a "continued relationship" and a "continued violation" which extended into the 180-day statute of limitations period of the Act. (App. 81).

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decide that the claims are time-barred under the Fair Housing Act, this action would be cognizable under § 1982. The court of appeals did not need to reach the issue of plaintiffs' standing under § 1982 (App. 64). Therefore, it would be appropriate, if necessary, to remand this issue to the court of appeals. The law is clear, however, that § 1982 is violated when a person's ability to buy, sell or lease property turns on race. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). A claim of injury resulting from racial steering practices is cognizable under § 1982, *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816, 819-20 (10th Cir. 1981), *Moore v. Townsend*, 525 F.2d 482, 485 (7th Cir. 1975), consistent with the fundamental principle that blacks are entitled to "the same right . . . enjoyed by white citizens." *See Sullivan v. Little Hunting Park*, 396 U.S. 229, 238-239 (1969). Standing under § 1982 has been granted to black renters and to white homeowners who are injured in their use of property, as well as to a black person seeking information about buying a home notwithstanding the fact that that person was not actually trying to buy a home. *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 898 (3d Cir. 1977). Hence, Coleman who, because of her race, was given misinformation about the availability of rental housing in Havens' apartments, has a cognizable claim under § 1982 as well as under the Fair Housing Act. Coleman and Willis, who are residents of the housing market affected by Havens' racial steering practices and who have been injured by Havens' discriminatory acts, have standing to bring suit under § 1982. *Meyers, supra*; *Denny v. Hutchinson Sales Corp.*, 649 F.2d 816 (10th Cir. 1981). HOME, as a representative of its members who have been injured by Havens' practices, also has standing to bring suit under § 1982. *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1214 (8th Cir. 1972); *Huertas v. East River Housing Corp.*, 81 F.R.D. 641, 650 (S.D.N.Y. 1979).

Under the Fair Housing Act, "a civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing *practice* occurred." 42 U.S.C. § 3612(a) (emphasis added). The practice complained of here by respondents is racial steering, whereby information regarding the availability of rental housing is misrepresented depending upon the race of the applicant.

It is important to emphasize that respondents do not maintain that their suit is timely because the *effects* of acts occurring outside the 180-day period continued into the limitations period. Rather, respondents allege that the practice itself, the illegal policy of racial steering carried out by Havens, continued into the 180-day limitations period. Thus, petitioners' reliance on cases such as *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977), is misplaced. *Evans* held only that the continuation of effects of a past discriminatory act into the limitations period would not toll the statute of limitations. *Id.* at 558. Here, respondents clearly alleged that Havens maintained a policy of discrimination that was in full operation at least as of the July 13, 1978 incident involving plaintiff Coles.[43]

The other decisions relied upon by petitioners, *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894 (3d Cir. 1977), and *Stingley v. City of Lincoln Park*, 429 F. Supp. 1379 (E.D. Mich. 1977), also are inapplicable to this case because those actions were brought by individuals who were victims of only a single discriminatory act. Indeed, contrary to the implication created by petitioners' incomplete quotation from *Meyers*,[44] the Court of Appeals for the Third Circuit

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[43]The district court found that Havens indeed had adopted such a policy. *See* Findings of Fact, Appendix A at 2a.

[44]Pet. Br. 39.

there distinguished cases which "were class actions involving alleged patterns and practices of discrimination continuing to affect all members of the plaintiff class [from] the instant case [which] concerns a discrete act of alleged discrimination against the individual plaintiff." 559 F.2d at 899. In the class action cases alleging a practice of forbidden discrimination, an allegation identical to the one asserted by respondents in this case, the courts have consistently held that a continuing violation theory is appropriate.

Thus, several courts have held that as long as one act in a series of incidents evidencing a pattern or practice of discrimination occurs within the limitations period, a claim based on all the acts may be maintained. *Baker v. F&F Investment Co.*, 420 F.2d 1191, 1200 (7th Cir.), *cert. denied*, 400 U.S. 821 (1970); *Fair Housing Council, Inc. v. Eastern Bergen County Multiple Listing Services, Inc.*, 422 F. Supp. 1071, 1076 (D.N.J. 1976). Indeed, in *City of Chicago Heights v. Arquilla-DeHaan Realtors, Inc.*, No. 77-C-3305 (N.D. Ill., May 21, 1980), the complaint was filed more than 180 days after the alleged discrimination against the bona fide purchaser but within 180 days after the incidents involving testers. Although the trial court originally dismissed the claims as untimely, it vacated its initial order and found that all claims, including those of the bona fide plaintiff, were timely because the racial steering practices of the defendants were alleged to have continued into the 180-day limitations period, as evidenced by the tests conducted by the neighborhood association. Similarly, the claims of Willis and Coleman in the instant case were timely since they resulted from Havens' practice of racial steering which, as Coles' claim of July 13 shows, continued into the limitations period.

Most cases using a continuing violation theory to interpret a statute of limitations have arisen under the employment discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Without exception, courts of appeals have made it clear that, when a defendant engages in a continuing course of discrimination against an entire class, the statute of limitations is tolled by any of these wrongful acts. In these cases, all the acts which make up a defendant's discriminatory practice are within the scope of the suit, including specific instances which, if not part of an overall practice, would otherwise be time-barred.[45]

The continuing violation theory has been applied also to cases under the fair housing laws. For example, in *Concerned Tenants Ass'n of Indian Trails Apartments v. Indian Trails Apartments,* 496 F. Supp. 522 (N.D. Ill. 1980), the plaintiffs brought an action for discrimination on the basis of race in the terms and conditions of tenancies and in providing services and facilities to the plaintiffs. Defendants argued that some of the activities extended back to 1975 and could not be part of the suit which was filed in 1979. The district court rejected the defendants' argument stating:

> If the continuing violation theory is a viable one here, then the complaint was filed in a timely manner. . . . [T]he concept was discussed in relation

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[45] *E.g., Ass'n Against Discrimination in Employment v. City of Bridgeport,* 647 F.2d 256, 274-75 (2d Cir. 1981); *Gonzalez v. Firestone Tire & Rubber Co.,* 610 F.2d 241, 249 (5th Cir. 1980); *Cedeck v. Hamiltonian Federal Savings & Loan Ass'n,* 551 F.2d 1136, 1137 (8th Cir. 1977); *Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979, 987 (D.C. Cir. 1973); *Cox v. United States Gypsum Co.,* 409 F.2d 289, 290-91 (7th Cir. 1969).

> to Title VIII in *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 899 (3rd Cir. 1977). Although under the facts of that case no continuing violation was found, the court implied that under certain circumstances such a violation could be found. The Title VII cases where continuing violations have been found involved alleged patterns and practices of discrimination continuing to affect all members of the plaintiff class whereas the *Meyers* case concerned a discreet act of alleged discrimination against the individual plaintiff. In this case, the alleged actions of the defendants amounted to a pattern of failing to provide the same kind of services at the project as were afforded white tenants in the early 1970's. These actions allegedly occurred from sometime in the mid-1970's up to the time the consent decree was entered. This appears then to be a classic example of a complaint alleging a continuing violation of 42 U.S.C. § 3604(b), and thus the action was filed within 180 days of the alleged discriminatory housing practice.

496 F. Supp. at 526. Similarly, the incidents set forth in plaintiffs' complaint in this case are part of the continuing practice of Havens in discriminating against the plaintiff class and were timely filed.

Havens argues that the incidents alleged in the complaint were "discrete acts" rather than part of a discriminatory "practice." The court of appeals below, however, dismissed such argument as simplistic, noting that it is the petitioners' behavior over a period of time which is at issue:

> There is an appealing simplicity equating "occurrence" to a discrete act. Not simple, however, are the social ills targeted by Congress nor the actions of putative landlords. It is not isolated instances

> of discrimination that are the primary focus of the statute—rather it is a generalized practice of housing discrimination. [App. 79]

Havens' contends that since the Fair Housing Act defines a discriminatory "practice" as an "act" that is unlawful under the Act's substantive provisions,[46] the 180-day limitations period begins to run with the first act of discrimination. Petitioners' argument ignores the nature of the violation charged. A policy of racial steering, the wrong alleged by respondents here, violates the Fair Housing Act. *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977). This is an invidious practice of discrimination which, in order to succeed, must be practiced on all prospective tenants—black or white—with whom the realtor comes in contact, rather than against one individual. Before an action is brought alleging a policy of racial steering, it must be determined whether a defendant has performed and is continuing to perform acts of racial discrimination.[47]

The nature of a policy of racial steering is such that the preparation of a valid cause of action necessitates the accumulation of evidence over a period of time. Petitioners' position suggests that as soon as one instance

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[46] 42 U.S.C. § 3602(f).

[47] Petitioners also argue that, under the Act, *only* the Attorney General may bring an action challenging a "pattern or practice" in violation of the Act. Such a reading of the Act misplaces the emphasis of § 813 which grants limited enforcement rights to the government. Under § 813, the only suits the Attorney General may bring are pattern and practice cases. But nothing in § 813, so limiting the Attorney General, limits the enforcement rights of private parties to bring suit under § 812, the section under which respondents initiated this action.

of discrimination becomes apparent a plaintiff should immediately allege a pattern of racial discrimination. In order to assure that an action is not frivolous, verification of the complaint, testing, documentation and analysis must be performed, all of which take time. If this Court were to rule that the earlier incidents which took place outside the 180-day limitations period of the Act are barred even though the practice of which they are a part continued into the limitations period, the result would be to frustrate the initiation of valid racial steering claims and encourage the institution of hurried and unsubstantiated claims.

CONCLUSION

Petitioners have proposed the application of untenable limitations on the strong private enforcement intended by Congress in the Fair Housing Act. Respondents Coleman, Willis and HOME, on the other hand, have made claims of injury that this Court has held to be cognizable under the Fair Housing Act. Denial of respondents' right to press their claims would be a retreat from this Court's prior decisions in fair housing cases and a setback to the stated objectives of the Fair Housing Act.

The district court erroneously dismissed the respondents' complaint, relying on an incorrect rule of law. In reversing, the court of appeals corrected this error and remanded the case for further development of the factual record, consistent with this Court's guidance concerning the requirements for making standing determinations in fair housing cases.

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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September 9, 1981

Special thanks are due to law students Carol Fisler, Tradd Schneiderman, Matthew Epstein and Russell Duncan.

APPENDIX

APPENDIX A

FINDINGS OF FACT

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action No. 79-0024-R

PAUL ALLEN COLES,
Plaintiff,

v.

HAVENS REALTY CORPORATION
and
ROSE JONES,
Defendants.

FINDINGS OF FACT

Richmond, Virginia
June 23, 1980

BEFORE: HONORABLE D. DORTCH WARRINER
United States District Judge

APPEARANCES: McSWEENEY AND STUTTS
By: James F. Stutts, Esquire
Counsel for Plaintiff

HIRSCHLER, FLEISCHER, WEINBERG & COX
By: Richard W. Hogan, Esquire
Counsel for Defendants

THE COURT: The Court finds all of the uncontroverted facts as set forth in the final pretrial order, and the Court also finds all of the facts set forth in the proposed findings of fact and admitted by the opposing party.

In addition to that, the Court finds that Havens Realty established a policy of discrimination against black people in the rental of its apartments. This was a policy which was intended to discourage the rental of apartments to blacks. It took the form of being unreceptive to black persons who sought to rent, giving them misinformation or grudgingly giving them correct information, being meticulous in scrutinizing their applications to see if there would be an excuse for turning them down within the guidelines set forth for rental and in general making it more difficult for a black applicant to be successful than a white applicant. This was a conscious and deliberate policy on the part of Havens Realty, and it was carried out under the direction of Mr. Arthur Havens, Mr. Welch, by Miss Ferrell, and Miss Jones.

The effect of this discriminatory policy was to violate the provisions of the Fair Housing Act and to violate the provisions of the Civil Rights Act of 1866.

The Court reaches this determination largely on the basis of the testimony of Miss Ferrell. It is true that there are classic reasons for Miss Ferrell to have lied. She was a disgruntled former employee, fired for letting her personal life interfere with the conduct of the business of Havens Realty. The Court has taken that into account.

The Court has also taken into account the fact that Miss Jones has also some classic reasons to not tell the truth. Miss Jones is an employee of Havens Realty. She is presently such an employee. She earns a reasonably good salary. She has an apartment that she lives in. She has been favored by her employer with a good job, and so she has a good reason not to tell the truth. I say "a good reason". She has a classic reason. There is never a good reason for not telling the truth.

The same, of course, is true of Mr. Welch and Mr. Havens. They stand accused in this case. They know that they may be liable for a substantial sum of money and also disapprobation in the community that they would in this year of our Lord nineteen hundred and eighty still be persisting in racial discrimination in housing, when this nation through every organ that it has, Legislative, Executive, and Judicial, has made it clear that discrimination in housing and discrimination in all of its aspects based on race cease. The nation has made it clear that it shall cease, though it costs people money. The nation has made it clear that it will cease though occupancy may fall below 80 percent. The nation has made it clear that the price must be paid to end discrimination in housing on the basis of race.

I recognize that when I make a judgment on the preponderance of the evidence that there could be left a substantial amount of doubt, far more than a reasonable doubt, that I'm correct. I may be wrong. It may be that Miss Ferrell has a twisted soul that thirsts after all these months to come into court and make things difficult for Miss Jones, and Mr. Havens, and Mr. Welch. But I have to determine whether that is more likely so than not. And I have weighed all of the evidence, observed the witnesses on the witness stand,

considered what each has at stake in this case, how each happened to be here to testify, and I have simply concluded that it's more likely than not that Miss Ferrell was telling the truth.

I am constrained to say a word or two about HOME. I'm disappointed. I think that one of the hallmarks of a group attempting to correct an evil is, or should be, utter fairness and objectivity. I don't believe the system that was set up, and the uses that were made of it, the instructions that were given, and methods that were adopted can be classified as fair. I can say that the result would be almost preordained by the method selected and the actual practice to which those methods were put. And it is a shame, too, when one considers the noble goal, to observe the not so noble methods.

Now, in the case of Mr. Coles, the named plaintiff, the Court doesn't believe that Mr. Coles said, "What about August, September, or October". The only way that Mr. Coles had of remembering that he did was the fact that he remembered that he did in other cases and that he would have been as well satisfied were it August, September, or October. If he can remember that he did it in other cases a few days before and a few days after, perhaps on the very day that he went to Havens, the question arises, "Why couldn't he remember that he did it at Havens?" When he was asked to record, at a time when the events were fresh in his mind, the significant facts that happened and when he was being questioned by persons who are experienced in the field of what is sometimes known as housing research, he failed to note an extremely significant fact and yet can remember it almost, what, two years later. I can't believe it. And yet I don't think that his failure to ask that question is nearly as significant as it might seem, because Mr. Welch

testified that their job was to rent apartments. Mr. Havens testified that their job was to see to it that they didn't fall below 80 percent because that was the road to bankruptcy, that the only way they could make money was to be up closer to the hundred percent mark.

If one approaches a resident manager about an apartment, this Court simply doesn't believe that there would be a policy or a practice on the part of a real estate agency to say that there's nothing available merely because there wasn't anything available at that day and hour. Human experience, leaving aside the evidence, would tell you that simply wouldn't be the way that you get 80 percent occupancy or better.

To the contrary, you say, "I haven't anything today, but we have vacancies with great frequency", or, "We have a vacancy coming up in two weeks, we have a vacancy coming up the first of next month." You tell the prospect what you have, in hopes that it will satisfy him. Everybody does that. Indeed, Mr. Welch's evidence supports that common sense idea that when you're selling, you attempt to sell. And that's what they were doing—selling. So whether or not Mr. Coles asked about August, September, or October, if one applies in the middle of July, unless there is a reason for not telling him that there will be a vacancy in three weeks, one is going to be told of that vacancy, and Mr. Coles wasn't.

In considering the evidence about the policy they had at Havens Realty, it is more likely than not that the reason he wasn't told was because he is a black person, and that's against the law. That can't be a reason. If the reason that he was told was that he had Miss Hatcher with him, and Miss Hatcher was dressed and acted like a floozy or something of that nature, then that's not

against the law. If the reason that he was denied it was because he was married but this woman was not his wife, that's not against the law. If he was out there in cutoffs and sandals and had no shirt on and that's the reason, that's not against the law.

There is no evidence that would lead the Court to believe that there was a reason here other than the fact that he was black. Now, I recognize that puts upon Havens Realty a terrific burden. They don't even remember the incident. They cannot be expected to remember it. But when they have, according to the evidence, set up a policy of discrimination against black persons and a black person is refused an apartment and there is no other explanation for it, I think it is reasonable for the Court to accept the fact that the explanation, more likely than not, is that he was black.

Now, Mr. Coles is entitled to damages. Neither of the parties has addressed that issue to any great extent. And Mr. Coles professed to no great degree of hurt, and yet I can well imagine that there was a hurt feeling. Indeed, I can imagine that he was mad when he learned that he had been discriminated against because of his race, contrary to the laws of the land and contrary to decency. How does one put a price on being hurt and mad? One wishes he had a jury; that's how one does it.

I am going to reserve judgment on the amount of damages because there may be appearances by other class members, and if the Court can develop some experience along the line, I may then have a better idea of how to render a fair judgment as to how the damages can be compensated in money.

In the meantime, I would be happy to hear from either counsel through post-trial briefs as to what is a reasonable compensation in a case of this type.

Now, gentlemen, have I omitted to make a finding that I should have made, or have I omitted to reach a conclusion that I should have reached?

MR. STUTTS: Your Honor, Plaintiffs have asked for injunctive relief and attorney's fees, and it seems appropriate that may be briefed along with the damage issue post trial.

THE COURT: All right, sir. Do you concur with that, Mr. Hogan?

MR. HOGAN: Yes, sir, that's fine. Has the Court adjudicated that all of the members of the class who can prove claims are entitled to relief?

THE COURT: Incidentally, did I make a finding of fact as to Rose Jones?

MR. HOGAN: That was going to be my next question.

THE COURT: I cannot find that it is more likely than not in the case of Mr. Coles that she was the agent carrying out the policy at the particular time that Mr. Coles applied. Accordingly, with respect to Mr. Coles, I do not find her implicated. Of course, she was, under the evidence, evidence which the Court accepts as true, an agent of Havens Realty and its policy to discriminate against black persons. And on behalf of the classes the Court finds against Miss Jones, along with Havens Realty.

Now, with respect to what relief is available to a class, this is my understanding, and I may be wrong, and I ask for your guidance on this. It is my understanding that there having been a finding in favor of the plaintiff class, then under those circumstances a member of the plaintiff class who identifies himself as such and shows himself to be a member of the class is presumptively a victim of the racial discrimination. The burden is upon the defendant

to show that a member of the class either, one, was not discriminated against, or, two, suffered no damages as a result of any such discrimination.

That's my understanding, Mr. Hogan. Is it yours?

MR. HOGAN: Your Honor, we would like the opportunity to brief that question, as well.

THE COURT: Can you answer my question?

MR. HOGAN: Your Honor, it's my view that under the law each class member must still prove his claim, must prove that he was a qualified applicant, that is, that the denial of housing would not have occurred other than because of race. He must prove that he actually made application or came in and asked about an apartment, and he must establish that he was turned down because of his race.

THE COURT: Well, now, under that interpretation, Mr. Hogan, there was no utility at all in having a class action, was there?

MR. HOGAN: That's been my contention all along, Your Honor, but my view would be different had each and every black who applied for an apartment at Havens Realty been turned down. But under the record that we have in this case, I don't see how the Court can conclude that each and every black person who files a claim and says, "I asked for an apartment at Havens Realty, and they told me they didn't have anything available", I don't see how the Court can conclude that person is automatically entitled to relief.

THE COURT: I think it's a question of burden of proof. My understanding is that the burden of proof shifts to the defendant to show that the class member, presumptively a victim of the policy of racial discrimination, was

not in fact discriminated against. I think that burden is upon the defendant, but I will be happy to receive briefs from counsel on that question.

Mr. Stutts, do you concur or disagree with the Court's understanding?

MR. STUTTS: Your Honor, it's my understanding that the utility of the case would have been a finding which would have allowed class members then to come forward with that presumption and then leave the defendants in a position to rebut that presumption if they are able to, the presumption being that they have been discriminated against by the defendants.

THE COURT: In what way did what you said differ from what I said?

MR. STUTTS: I guess that's a long way of saying I agree.

THE COURT: Oh, all right. Is there anything further, gentlemen?

MR. STUTTS: No, Your Honor.

MR. HOGAN: Nothing for defendants, Your Honor.

(Court adjourned at 12:25 p.m.)

APPENDIX B

Coles v. Havens Realty Corporation
(DC, E.D., Va.)

Civil Action No. 79-0024
Decided 2-17-81

CONSENT ORDER

This is a class action brought by the named plaintiff under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 et seq. and the Civil Rights Act of 1866, 42 U.S.C. § 1982. The Complaint alleges that the defendants have engaged in acts, policies, and patterns of denying housing on the basis of race or color and of preserving and encouraging patterns of racial segregation in available housing by denying apartments to black persons or by "steering" black persons to selected buildings and away from other buildings and by steering white persons to certain selected buildings. Such acts, policies, patterns and practices are in direct violation of the above-referenced statutes.

On February 13, 1980, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, the Court certified a class composed of all black persons who may have been injured monetarily by the alleged racial steering practices of the defendants on or since January 9, 1977. Plaintiff Paul Allen Coles was designated to act as representative for this class. The Court also certified a subclass composed of all black persons who may have been injured monetarily by the alleged racial steering practices of the

defendants on or since July 13, 1978. Plaintiff Paul Allen Coles was designated to act as representative for this subclass. Notice to prospective class members, as they could best be ascertained from the defendants' records, was mailed on or about May 15, 1980.

The trial of the case of Paul Allen Coles v. Havens Realty Corporation, et al. was held in this Court on June 22 and 23, 1980. The Court finds from the evidence presented in this case that the policies and acts of the defendants Havens Realty Corporation and Rose Jones violated the provisions of the Fair Housing Act of 1968 and the Civil Rights Act of 1866.

The parties are desirous of resolving this matter, including resolution of any remaining issues to be determined by this Court without the time and expense of further litigation, and whereas the defendants hereby agree to comply with the terms and provisions of this Order, and to dismiss the appeal of this action to the Fourth Circuit Court of Appeals, plaintiff agrees not to seek a litigated determination of any remaining unresolved factual or legal issues. On these bases, both the plaintiff and defendants consent to the entry of this Order. Accordingly, it is

ORDERED, ADJUDGED, AND DECREED that the defendants Havens Realty Corporation (hereinafter referred to as "Havens") and Rose Jones are hereby permanently enjoined from violating the terms of the Fair Housing Act of 1968 and the Civil Rights Act of 1866. It is further

ORDERED, ADJUDGED, AND DECREED that the terms and provisions of Sections I and II of this Consent Order shall remain in full force and effect for three (3) years from the date of entry of this Order, at which

time the provisions hereof shall expire automatically; provided, however, that if the Court finds that the defendants materially violate any of the provisions of Sections I and II of this Order, or the injunctive provisions hereof, the Court will determine appropriate relief therefor, including possible extension of Section I and II beyond the date Sections I and II would otherwise terminate.

I. RENTAL PROCEDURES. It is further ORDERED, ADJUDGED AND DECREED that within the time periods specified below, Havens shall implement the following procedures with regard to the rental of apartments at its Camelot Townhouse and Colonial Court complexes.

A. Beginning not later than thirty (30) days from the date of the entry of this Order, Havens shall establish and thereafter continuously maintain and display in its rental office, in a conspicuous location, at all times, a current "Apartment Availability" display indicating the types of rental dwellings which it knows or believes are currently available for rent and which it anticipates will become available. Information concerning these availabilities will be made known, whenever possible, to persons inquiring by telephone about apartments at Colonial Court or Camelot Townhouse. In addition, Havens shall maintain a Rental Availability Activity Record for each of its complexes which shall indicate, by apartment number, on a continuous basis, in a narrative form, such information that becomes known to Havens regarding actual or anticipated dates upon which such apartment will or may become available for rent. When an apartment is leased, the narrative will state the date and time the lease was signed and the name and race of the lessee. Finally, Havens will post in a conspicuous

location, or prepare and have available for distribution to all persons who submit an application for an apartment, a statement of criteria and procedures employed by it in approving or disapproving applications. Although such statement shall disclose what criteria are utilized by Havens, it is not required that it disclose the specifics of such criteria that would enable applicants or potential applicants to complete an application with information with actual knowledge of whether the application will be accepted by Havens. For example, if Havens customarily requires that rental payments not exceed a percentage of gross or net income, Havens shall so state but Havens is not required to disclose what that percentage is. Any restrictions that may be applicable to particular dwelling units (e.g., no pets allowed in a particular section) shall also be stated. Every two weeks, Havens shall mail two copies of the information which is reflected on the display at the end of the business day as well as two copies of the Rental Activity Availability Record to the Virginia Real Estate Commission ("the Commission"). Havens shall also mail a copy of its initial rental criteria disclosure statement to the Commission, showing the specifics of the rental criteria, and thereafter provide the Commission with notice of any changes or modifications thereto. The rental disclosure statement showing the specific rental criteria shall be for the Commission's and Housing Opportunity Made Equal's (HOME's) confidential use and shall not be disseminated to the public.

B. Beginning not later than thirty (30) days from the date of the entry of this Order, Havens shall commence the use of an "Office Registration Form" to obtain information set forth on the form from persons visiting its rental office and inquiring as to the availability of

apartments. Havens shall indicate on all completed forms the race of the applicant by marking a "W" for white persons, a "B" for black persons, and an "O" for persons of other or unknown races. Havens is not required to have the Office Registration Form completed by all persons visiting its rental office and inquiring as to the availability of apartments, and it need only request such persons to complete same. Havens shall accumulate copies of the Office Registration Forms and forward two copies quarterly to the Commission. Upon not less than five (5) working days notice to Havens, the Commission shall have the right to be provided with copies, at the Commission's expense, of rental applications and executed leases, provided, however, that the Commission shall only be so entitled if it makes such request by either (i) identifying the name of the current tenant(s) in respect of whom it desires a copy of the rental application(s) or executed lease(s), or (ii) identifying the apartment number(s) in respect to which it desires a copy of the rental application(s) or executed lease(s) pertaining to the then current tenant or the tenant occupying that apartment immediately prior to the then current tenant. The request for such information shall be made to the Commission by HOME. HOME shall make such requests only when it has a need for such individual applications and executed leases, and HOME shall not make such requests merely for the purpose of collecting such information and documents merely in the event that it may, at some time in the future, have a need for them.

II. DISPLAY OF FAIR HOUSING STATEMENT. It is further ORDERED, ADJUDGED AND DECREED that Havens shall include in all public advertisements of any dwellings offered for rent that are published more

than thirty (30) days after the date of the entry of this Order, on all rental applications, leases, and on the "Apartment Availability" display the following statement in bold-face type:

"HAVENS REALTY CORPORATION IS AN EQUAL HOUSING OPPORTUNITY REALTOR";

provided, however, that the statement shall not be required to be used in advertisements that are smaller than four column inches. Havens shall also display the fair housing poster that is recommended in the United States Department of Housing and Urban Development Guidelines, 37 Fed. Reg. 6700, in a conspicuous location in its office, and the Equal Housing Opportunity logotype and statement on its rental signs as provided in 37 Fed. Reg. 6700.

III. DAMAGES. It is further ORDERED, ADJUDGED AND DECREED that not later than 30 days from the date of this Order Havens shall deposit in the Court registry the sum of Thirteen Thousand Five Hundred Dollars ($13,500) to be distributed among all claimants whose Proof of Claim forms are approved in the manner set forth below.

Claimants shall be required to file Proof of Claim forms not later than sixty days from the date of the approval hearing on this Order. Each Proof of Claim form will be reviewed by counsel for HOME and counsel for Havens. The validity of each claim shall be established presumptively by a prima facie showing of racial discrimination. For purposes of this Consent Order, this standard will be met by a claimant's sworn statement that he sought housing information during the period in question about the Camelot Townhouse/Colonial Court Complex but was told that there were no apartments

available or that there were apartments available only at Colonial Court or that he sought housing information about Camelot Townhouse only but was told that there were no apartments available or that there were apartments available only at Colonial Court. Havens shall have the opportunity to dispute such claims by coming forward with evidence of a neutral (nondiscriminatory) justification for its actions. The claimant shall then have the opportunity to rebut Havens' evidence.

Not later than thirty days from the final date for submission of Proof of Claim forms, counsel shall submit to the United States Magistrate a detailed report of their findings including a descriptive list of all Proof of Claim forms reviewed, the manner in which the review was conducted, and the disposition (with explanation) of each claim. Any claim which is rejected or objected to, or as to which any question is raised, by either designee, will be referred to the Magistrate for such further proceedings as he may deem appropriate to determine its validity. Such proceedings may include, inter alia, the taking of evidence, the holding of hearings, and the submission of written statements. Claimants will be promptly informed as to the disposition of their claims or, where applicable, of their referral to the Magistrate.

At the conclusion of the claims review process, the $13,500 fund will be divided pro-rata among all claimants whose claims have been approved, provided, however, that in no event shall any claimant be entitled to receive in excess of $1,000. Named plaintiff Paul Allen Coles will receive $2,250 which is not included in the $13,500 fund. If, after distribution of the fund, there are funds remaining, such funds shall be returned to Havens.

The Court, in its discretion, may order a final report to be submitted by the Magistrate detailing the ultimate disposition of all claims and funds.

IV. CONTACTING AND COUNSELING PROSPECTIVE CLAIMANTS. In addition to the notice procedures prescribed by the Court, HOME or its representatives may contact persons whom it believes have cause to assert claims pursuant to this Order. Such contacts shall be limited to identifying prospective claimants and then to delivery in person, by posting, by mail or by reading on the telephone the following notice:

Dear _____:

We are writing to inform you that you may file a claim for money damages in a housing discrimination lawsuit.

The lawsuit was filed in January 1979 in the United States District Court in Richmond by Paul Allen Coles against Havens Realty Corporation. The plaintiff claimed that Havens Realty discriminated in the rental of apartments at its Camelot Townhouse and Colonial Court apartments. Havens Realty has agreed to pay the total sum of $13,500 to be divided among persons who can come with sworn claims proving racial discrimination by Havens Realty. Each person proving a claim would be limited to $1,000. It is not necessary for you to have rented an apartment from Havens Realty in order to prove a claim.

If, since January 9, 1977, you have sought apartments at the Colonial Court and Camelot Townhouse apartments and were told by Havens Realty either that nothing was available or that apartments were available only at Colonial Court, you may have a claim for discrimination. If this is the case and you are interested in filing a claim,

contact James F. Stutts, attorney for the plaintiff, at 121 Shockoe Slip, Richmond, Virginia 23219, telephone 643-5192.

Havens shall pay actual attorneys fees in the total aggregate amount of $750 to McSweeney, Stutts & Burtch, for advising any and all claimants with respect to the filing of claims pursuant to this Order. No other attorneys fees incurred by any claimant shall be awarded.

V. ATTORNEY FEES. It is further ORDERED, ADJUDGED AND DECREED that the defendants shall pay to the plaintiff's counsel, in addition to the sum specified in Section IV herein, the total sum of Seventeen Thousand Five Hundred Dollars ($17,500) as attorney's fees.

VI. RELEASE AND DISMISSAL. The payment of the foregoing amounts by the defendants shall constitute a full release, accord, and satisfaction by all plaintiffs, including those that may hereafter be joined by the Court pursuant to the class certification of this action, for all damages, costs, expenses, and fees incurred in all negotiations and/or other activities arising out of the Complaint filed herein.

Except for Sections I and II of this Order which require affirmative duties on the part of the defendants, this action shall stand dismissed.

APPENDIX C

THE CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

United States Constitution, article III, section 2, clause 1:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdictions;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

- 14 STAT. 27, 42 U.S.C. § 1982 (1977)

  § 1982. Property rights of citizens

  All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

- 82 STAT. 81, 92 STAT. 2679, 42 U.S.C. § 3602

  § 3602. Definitions

  As used in this subchapter—

(a) "Secretary" means the Secretary of Housing and Urban Development.

(b) "Dwelling" means any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

(c) "Family" includes a single individual.

(d) "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, cases under Title 11, receivers, and fiduciaries.

(e) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(f) "Discriminatory housing practice" means an act that is unlawful under section 3604, 3605, or 3606 of this title.

(g) "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.

• 82 STAT. 83, 88 STAT. 729, 42 U.S.C. § 3604

§ 3604. Discrimination in sale or rental of housing

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful–

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for

the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

• 82 STAT. 83, 88 STAT. 729, 42 U.S.C. § 3605

§ 3605. Discrimination in financing of housing

After December 31, 1968, it shall be unlawful for any bank, building and loan association, insurance company or other corporation, association, firm or enterprise whose business consists in whole or in part in the making of commercial real estate

loans, to deny a loan or other financial assistance to a person applying therefor for the purpose of purchasing, constructing, improving, repairing, or maintaining a dwelling, or to discriminate against him in the fixing of the amount, interest rate, duration, or other terms or conditions of such loan or other financial assistance, because of the race, color, religion, sex, or national origin of such person or of any person associated with him in connection with such loan or other financial assistance or the purposes of such loan or other financial assistance, or of the present or prospective owners, lessees, tenants, or occupants of the dwelling or dwellings in relation to which such loan or other financial assistance is to be made or given: Provided, That nothing contained in this section shall impair the scope or effectiveness of the exception contained in section 3603(b) of this title.

- 82 STAT. 84, 88 STAT. 729, 42 U.S.C. § 3606

§ 3606. Discrimination in provision of brokerage services

After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, or national origin.

- 82 STAT. 85, 42 U.S.C. § 3610

§ 3610. Enforcement

Person aggrieved; complaint; copy; investigation; informal proceedings; violations of secrecy; penalties

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this subchapter without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

Complaint; limitations; answer; amendments; verification

(b) A complaint under subsection (a) of this section shall be filed within one hundred and eighty days after the alleged discriminatory housing

practice occurred. Complaints shall be in writing and shall state the facts upon which the allegations of a discriminatory housing practice are based. Complaints may be reasonably and fairly amended at any time. A respondent may file an answer to the complaint against him and with the leave of the Secretary, which shall be granted whenever it would be reasonable and fair to do so, may amend his answer at any time. Both complaints and answers shall be verified.

Notification of State or local agency of violation of State or local fair housing law; commencement of State or local law enforcement proceedings; certification of circumstances requisite for action by Secretary

(c) Wherever a State or local fair housing law provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter, the Secretary shall notify the appropriate State or local agency of any complaint filed under this subchapter which appears to constitute a violation of such State or local fair housing law, and the Secretary shall take no further action with respect to such complaint if the appropriate State or local law enforcement official has, within thirty days from the date the alleged offense has been brought to his attention, commenced proceedings in the matter, or, having done so, carries forward such proceedings with reasonable promptness. In no event shall the Secretary take further action unless he certifies that in his judgment, under the circumstances of the particular case, the protection of the rights of the parties or the interests of justice require such action.

Commencement of civil actions; State or local remedies available; jurisdiction and venue; findings; injunctions; appropriate affirmative orders

(d) If within thirty days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c) of this section, the Secretary has been unable to obtain voluntary compliance with this subchapter, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this subchapter, insofar as such rights relate to the subject of the complaint: Provided, That no such civil action may be brought in any United States district court if the person aggrieved has a judicial remedy under a State or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in this subchapter. Such actions may be brought without regard to the amount in controversy in any United States district court for the district in which the discriminatory housing practice is alleged to have occurred or be about to occur or in which the respondent resides or transacts business. If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to the provisions of section 3612 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.

Burden of proof

(e) In any proceeding brought pursuant to this section, the burden of proof shall be on the complainant.

Trial of action; termination of voluntary compliance efforts

(f) Whenever an action filed by an individual, in either Federal or State court, pursuant to this section or section 3612 of this title, shall come to trial the Secretary shall immediately terminate all efforts to obtain voluntary compliance.

• 82 STAT. 88, 42 U.S.C. § 3612

§ 3612. Enforcement by private persons

Civil action; Federal and State jurisdiction; complaint; limitations; continuance pending conciliation efforts; prior bona fide transactions unaffected by court orders

(a) The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: Provided, however, That the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: And provided, however, That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumberancer,

or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

Appointment of counsel and commencement of civil actions in Federal or State courts without payment of fees, costs, or security

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

Injunctive relief and damages; limitation; court costs; attorney fees

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

• 82 STAT. 88, 42 U.S.C. § 3613

§ 3613. Enforcement by Attorney General; issues of general public importance; civil action; Federal jurisdiction; complaint; preventive relief

Whenever the Attorney General has reasonable cause to believe that any person or group of persons

is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this subchapter, or that any group of persons has been denied any of the rights granted by this subchapter and such denial raises an issue of general public importance, he may bring a civil action in any appropriate United States district court by filing with it a complaint setting forth the facts and requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order against the person or persons responsible for such pattern or practice or denial of rights, as he deems necessary to insure the full enjoyment of the rights granted by this subchapter.

- 82 STAT. 89, 42 U.S.C. § 3617

§ 3617. Interference, coercion, or intimidation; enforcement by civil action

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief for Respondents have been served by mail on Everette G. Allen, Jr., Hirschler, Fleischer, Weinberg, Cox & Allen, Post Office Box 12085, Four North Fourth Street, Richmond, Virginia 23241, Counsel of Record for the Petitioners.

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No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION and
ROSE JONES,
Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. SINCE RESPONDENTS REQUESTED BOTH MONETARY AND INJUNCTIVE RELIEF NOT GRANTED IN *COLES V. HAVENS REALTY CORP.*, THIS CASE IS NOT MOOT	1
II. A MOTION TO DISMISS FOR LACK OF STANDING IS PROPERLY GRANTED WHEN A DISTRICT COURT CANNOT REASONABLY CONCLUDE, FROM THE COMPLAINT AND SUPPORTING AFFIDAVITS, IF ANY, THAT THE PLAINTIFFS HAVE STANDING	5
III. HOME AND COLEMEN LACK STANDING TO BRING THIS ACTION BASED ON A VIOLATION OF 3604(d) OF THE FAIR HOUSING ACT WHICH IS UNRELATED TO THE CAUSE OF ACTION ASSERTED IN THE COMPLAINT AND FOR WHICH THEY SUFFERED NO COGNIZABLE INJURY	12
CONCLUSION	16

TABLE OF AUTHORITIES

CASES:	Page
Aetna Life Insurance Company v. Haworth, 300 U.S. 227 (1937)	3
Bond v. Floyd, 385 U.S. 116 (1966)	3
Coles v. Havens Realty Corp., No. 79-0024 (E.D. Va., February 17, 1981), reprinted in 3 E.O.H.C. ¶18,031 (P-H)	2,3,4,11
Conley v. Gibson, 355 U.S. 41 (1957)	8
DeFunis v. Odegaard, 416 U.S. 312 (1974)	3
Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	14
Evers v. Dwyer, 358 U.S. 202 (1958)	10
Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Service, Inc., 422 F. Supp. 1071 (D.N.J. 1976)	11
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979)	8,10,14
Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973)	1
Lawn v. United States, 355 U.S. 339 (1958)	7
Linda R. S. v. Richard D., 410 U.S. 614 (1973)	8
O'Shea v. Littleton, 414 U.S. 488 (1974)	7
Pierson v. Ray, 386 U.S. 547 (1967)	10
Powell v. McCormack, 395 U.S. 486 (1969)	3
Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208 (1974)	7
Securities and Exchange Commission v. Medical Committee for Human Rights, 404 U.S. 403 (1972)	1
Shulthis v. McDougal, 225 U.S. 561 (1912)	9
Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976)	15
Thomas v. Board of Trustees of the Ohio State University, 195 U.S. 207 (1904)	9
Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205 (1972)	14

	Page
Turner v. A. B. Carter, Inc., 85 F.R.D. 360 (E.D.Va. 1980)	2
United States v. Richardson, 418 U.S. 166 (1974)	7
Warth v. Seldin, 422 U.S. 490 (1975)	6,8
CONSTITUTIONAL PROVISIONS:	
U.S.Const. art. III	6,14
STATUTES:	
42 U.S.C. § 3604	12,13, 14,15

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

ARGUMENT

I. SINCE RESPONDENTS REQUESTED BOTH MONETARY AND INJUNCTIVE RELIEF NOT GRANTED IN *COLES V. HAVENS REALTY CORP.*, THIS CASE IS NOT MOOT.

Amici Lawyers Committee for Civil Rights Under Law, *et al.*, and the United States have argued that the matters before this Court are, or may be, moot.[1] The basis for amici's

[1] Properly considered, mootness involves a determination of whether the plaintiff's injury continues unredressed, and a case may become moot either because plaintiff no longer suffers injury and it is unlikely to recur, *see e.g. Securities and Exchange Commission v. Medical Committee for Human Rights*, 404 U.S. 403 (1972), or because the injury suffered by the plaintiff has been redressed, *see e.g. Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973).

argument is a Consent Order, entered in *Coles v. Havens Realty Corp.*, No. 79-0024 (E.D.Va., February 17, 1981), reprinted in 3 E.O.H.C. ¶18,031 (P-H) (also reprinted in Appendix A to Brief for the United States as Amicus Curiae herein) (hereafter "*Coles*"). In the *Coles* case, Paul Allen Coles, a black man who had sought housing from petitioners, joined respondents' suit against petitioners. After respondents were dismissed from the suit, and final judgment was entered against them, Paul Allen Coles' action continued in the district court. Following trial and findings of fact by the district court, judgment against the defendants was entered in August, 1980, and a timely appeal taken (App. 8).[2] Subsequently, a consent order was entered by the district court on February 17, 1980, providing for certain injunctive and monetary relief for Paul Allen Coles and members of the class he represented (App. 10).[3]

It is absolutely clear that the relief requested by respondents herein was not granted in the Consent Order. In addition to injunctive relief, all respondents requested monetary relief, praying for a judgment:

> (e) awarding to each of the tester plaintiffs Sylvia Coleman and R. Kent Willis the sum of $1,000 in actual damages and $1,000 in punitive damages;
>
> (f) awarding to HOME its expenses of testing and monitoring defendants' practices and its expenses pursuant to this litigation;
>
> (g) awarding to plaintiffs their costs and reasonable attorney fees in this action.

(App. 20). None of this relief is granted in the Consent Order. *Coles.* Furthermore, all injunctive relief requested by the respondents was not granted in the Consent Order. *Coles;* App. 19.

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[2] All references to pages numbered "App." are to the Joint Appendix.

[3] A class composed of all black persons who may have been injured monetarily by the alleged racial steering practices of the defendants on or since January 9, 1977, was certified on February 13, 1980. *Turner v. A. B. Carter, Inc.*, 85 F.R.D. 360 (E.D.Va. 1980).

The concept of mootness arises from the constitutionally mandated limitation on the jurisdiction of federal courts to "cases" and "controversies" between the litigants. *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1974). As this Court's decision in *Powell v. McCormack,* 395 U.S. 486, 495-500 (1969), makes clear, a live controversy remains in this case, although one of several forms of requested relief is unnecessary or unavailable. Furthermore, the United States' characterization of the injunctive relief requested by respondents as "the primary relief sought," Brief for the United States at 8, even if correct, is irrelevant. The argument that secondary claims are mooted by the mootness of primary claims was expressly rejected by this Court in *Powell v. McCormack,* 395 U.S. at 499-500. *See also Bond v. Floyd,* 385 U.S. 116, 128 n.4 (1966). Thus it is clear that, although certain injunctive relief was granted on behalf of Paul Allen Coles and his class, the remaining claims pressed by respondents are not moot. Respondents requested damages and injunctive relief against petitioners. That relief has not been granted, and indeed petitioners contend that respondents should not be permitted to proceed to the merits of their case because they lack standing. Clearly, the case remains "definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Insurance Company v. Haworth,* 300 U.S. 227, 240-41 (1937).

The Lawyers Committee for Civil Rights Under Law further suggests that this case is moot by virtue of certain language in the *Coles* Consent Order stating that payment of the amounts specified in the Consent Order "shall constitute a full release, accord and satisfaction by all plaintiffs . . . for all damages, costs, expenses and fees . . . arising out of the Complaint filed herein." Brief for Lawyers Committee for Civil Rights Under Law at 9. The respondents were not parties to the *Coles* matter at the time the Consent Order was entered, and that decree patently could not bar their claims for damages, were they proper parties to assert those claims.

The Lawyers Committee also lists several "advantages" to dismissing the writ as improvidently granted, primarily related to petitioners' arguments that respondents simply have not alleged concrete facts from which a district court could have

concluded that respondents have standing to maintain this action. Brief for Lawyers' Committee for Civil Rights Under Law at 10. Although amicus refers to the total absence of such facts as "the ambiguities of the record," *id.*, it is absolutely clear that the record below was made by respondents' own choice. It is in no sense ambiguous. Respondents' chose in the district court, and indeed in the circuit court, to stand on their complaint as filed, making no effort to amend the complaint or file affidavits to support their standing. *See* argument *infra* at 6. Although they apparently wish they had acted differently, their desire to rectify their errors comes too late. A decision in this case must be rendered to correct the errors made by the Fourth Circuit Court of Appeals.

The United States as amicus also suggests that, even if all of the relief sought by respondents has not been granted, the *Coles* Consent Order "greatly reduces the practical importance of the respondents' claims," and that the writ should be dismissed. Brief for the United States at 8. The suggestion that this case lacks "practical importance" is astonishing, for several reasons, even aside from those of the parties themselves. First, the decision of the Court of Appeals for the Fourth Circuit patently ignores mandatory constitutional limitations on standing and that decision must be reversed. The importance of these constitutional issues, not only in the context of this case, but in the broader context of standing law generally, is tremendous. Second, in addition to the United States, thirty-seven organizations believe the case to be of sufficient "practical importance" to file or join in briefs expressing the position of their organizations or members on the issues raised in this case. Each claims that the issues are of broad social relevance. In short, the United States' attempt to denigrate the importance of the constitutional and federal statutory issues of this case should be ignored.[4]

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[4] Amicus also suggests that because Arthur E. Havens, Jr.'s real estate license was suspended for six months, the "practical importance" of the case is further reduced. Brief for the United States at 8 n.7. However, Mr. Havens is not a party to this case, and, in fact, Mr. Havens voluntarily surrendered his

(*footnote continues*)

The controversy between petitioners and respondents in this case is alive and involves important questions of constitutional and federal law. No reason appears why these issues should not be decided.

II. A MOTION TO DISMISS FOR LACK OF STANDING IS PROPERLY GRANTED WHEN A DISTRICT COURT CANNOT REASONABLY CONCLUDE, FROM THE COMPLAINT AND SUPPORTING AFFIDAVITS, IF ANY, THAT THE PLAINTIFFS HAVE STANDING.

Respondents argue that the motion to dismiss for lack of standing was not properly granted because respondents should have been allowed "to develop key aspects of the complaint." Brief for Respondents at 14.[5] Indeed, respondents' argument suggests that a motion to dismiss for lack of standing should *never* be granted because of the potential complexity of facts relating to standing. Brief for Respondents at 14 and 16. This argument results from misconceptions concerning the concept of standing itself in its constitutional dimension, as well as the proper function and role of a motion to dismiss.

(*footnote continued*)

real estate license to avoid further time, expense and publicity upon the express condition, to which the Virginia Real Estate Commission agreed, that no action be taken by the Commission against Havens Realty Corporation or the licenses of Mr. Havens' wife and son. The voluntary and temporary surrender of Mr. Havens' license thus does not affect in any way the continuing controversy between the parties to this case.

[5] Respondents suggest that the district court's dismissal was the more odious because they requested an opportunity to develop such facts. The "request" consists of a footnote in their memorandum in opposition to the motion to dismiss, which was not timely filed. The footnote read:

> Since the defendants have declared their intention to depose a designated official of HOME on February 27, 1979, it is likely that further factual support for HOME's standing will be available for this Court's consideration. Accordingly, plaintiffs respectfully request that any ruling on this point be deferred pending this discovery.

(App. 51). It is difficult to understand how respondents intended to "develop key aspects" of their complaint in a deposition taken by petitioners. Furthermore, all facts supportive of respondents' standing were known by respondents or within their control.

In its constitutional dimension, U.S.Const. art. III, standing involves the power of federal courts to exercise jurisdiction in the matter. When it appears at the outset that the court may not properly exercise jurisdiction, the case should be dismissed. This is not to suggest that a plaintiff must prove his case to get into court. It *is* to suggest, however, that a plaintiff must allege sufficient facts for a court to reasonably conclude that jurisdiction exists or must supply those facts by affidavit in response to a motion to dismiss. *See Warth v. Seldin*, 422 U.S. 490, 501-502 (1975). To suggest that a court should bring to bear on a defendant all of the coercive force of the federal judiciary with no idea whether that force is properly called into play is nonsensical. Standing is a threshhold issue precisely because a court should not attempt to exercise jurisdiction where it does not exist, and where the jurisdiction is in doubt, it is asking but little for the plaintiff to demonstrate at the outset by what right he calls upon the court. Clearly, dismissal is not proper where a plaintiff provides the court with reasonable grounds for believing jurisdiction exists. Just as clearly, dismissal is mandated where, as in this case, a plaintiff makes no effort to provide the court with those grounds.

Furthermore, respondents cannot blame the district court for a hasty dismissal of their complaint before they had an opportunity to present the facts they now present for the first time in this Court. Respondents could and should have included in their complaint the relevant facts to support their standing. Since they did not do so, a proper motion to dismiss for lack of standing was filed. In response to the motion to dismiss, respondents made no attempt to file affidavits deemed supportive of their position.[6] Even in the face of an order dismissing the complaint, respondents, in their motion to reconsider, failed to submit for proper consideration by the district court the facts on which they now rely (App. 36-54). Again, they argued that the complaint was sufficient on its face (App. 38-54). Although respondents also complain that the district court should have allowed amendment of the complaint, respondents never sought to amend. In the circuit court,

[6] In fact, respondents did not respond to the motion to dismiss within the time prescribed by the local rules of court (App. 36-7, 55).

respondents again defended the complaint on its own merits. Apparently now realizing that a district court could not have concluded from the complaint that respondents have standing, they seek to have this Court determine the facts and affirm the decision of the circuit court based on facts and arguments raised here for the first time.

Under axiomatic principles, this Court cannot, and properly should not, consider facts and issues not presented in the courts below or contained in the record. *See e.g. Lawn v. United States*, 355 U.S. 339, 354 (1958). Respondents' brief and those of amici are replete not only with such facts, but also with issues of law not briefed or argued below. In fact, respondents are apparently unable to demonstrate that they have standing to bring this action on *any* of the myriad grounds asserted below without the assistance of facts and arguments which they failed to present to the district court or even to the circuit court. In short, respondents wish to argue before this Court a case which they made no attempt to present below. Under our system, facts are presented in the trial court—not the United States Supreme Court. Remanding this case would make a mockery of the federal judicial system.

Furthermore, respondents' attempt to distinguish this case from other cases in which this Court has affirmed a district court's dismissal for lack of standing, Brief for Respondents at 16-18, begs the question. Respondents argue that their complaint was not "fundamentally flawed," whereas the complaints in cases in which dismissal was affirmed were "structurally defective," because they failed to allege one of the three elements of standing. Brief for Respondents at 17. The question in this case is *whether* respondents' alleged sufficient facts for the district court to reasonably conclude that they had suffered distinct and palpable injury caused by defendants' acts which is likely to be remedied by the relief requested. Obviously, as respondents note, Brief for Respondents at 17 n.14, some cases have reached this Court following granting of a motion to dismiss for lack of standing, and the dismissal has been affirmed. *O'Shea v. Littleton*, 414 U.S. 488 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States v. Richardson*, 418 U.S. 166 (1974);

Linda R. S. v. Richard D., 410 U.S. 614 (1973). Other cases have reached this Court in a different procedural posture, and information other than the complaint was available. *Warth v. Seldin*, 422 U.S. 490 (1975); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). These observations do not assist in determining the standing issues in this case: were Coleman, Willis and HOME properly dismissed as plaintiffs because they failed to allege facts from which a district court could reasonably have concluded that they had standing.

Finally, respondents and amici, The National Committee Against Discrimination in Housing, Inc., *et al.*, argue that the notice pleading standard first articulated in *Conley v. Gibson*, 355 U.S. 41, 47 (1957), is applicable to this case and that, therefore, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. at 45-46. Indeed, respondents appear to argue that, as long as the complaint states that plaintiff is injured, the complaint is sufficient and the other elements of standing can await trial. Brief for Respondents at 23-25. Although this Court has not directly addressed the standing question in light of what must be pled, *Warth v. Seldin*, 422 U.S. at 508, clearly states that a plaintiff "must allege specific, concrete facts demonstrating that the challenged practices harm *him*, and that he personally would benefit from the court's intervention" (emphasis in original). That statement from *Warth* has become a maxim expressing the principal that the basic elements of a plaintiff's standing must appear in the complaint. The rule is compelled for the reasons expressed earlier in this brief with respect to the role and function of a motion to dismiss for lack of standing: the constitution imposes limits on the exercise of jurisdiction by the federal judiciary; the court should not act in the absence of reasonable grounds for believing it does so properly. *See supra* at 6.

The fact that standing is a jurisdictional question indicates that a somewhat different pleading standard should be applicable—the issue is not whether the defendant has been given sufficient information to understand the nature of the claim

against him. Rather, the issue is whether the defendant and, more importantly, the court itself, can determine at the outset that its coercive power is not invoked for some reason other than to adjudicate cases or controversies between litigants. Thus, the appropriate rule with respect to pleading standing, as with all jurisdictional prerequisites, is that the complaint must affirmatively and distinctly show the basis for standing. That basis cannot be supplied by inference or by argument. *Shulthis v. McDougal*, 225 U.S. 561, 569 (1912); *Thomas v. Board of Trustees of the Ohio State University*, 195 U.S. 207, 210 (1904). Respondents' complaint did not affirmatively and distinctly show the basis for their standing, nor did respondents seek to supply that basis by amendment or affidavit. The complaint was properly dismissed.

For example, HOME in its brief on the merits produces myriad facts not in the record in this case upon which it then relies for the proposition that its alleged injury is sufficient to confer standing in its own right. These facts, of course, cannot be considered. *See supra* at 7. Furthermore, even in all the facts improperly submitted to describe the counseling service on which HOME now relies, there is no allegation which suggests that HOME's counseling service, as opposed to its testing activities, is affected by the allegedly wrongful acts of petitioners. Nowhere is it alleged that HOME has attempted to place clients in Camelot or Colonial Court. Nowhere is it even alleged that Havens seeks to place clients in a geographic area affected by petitioners' alleged practices or in similar housing types. Respondents cannot satisfy constitutional standing requirements by vague allegations about its injury or the relationship between that injury and petitioners' alleged acts. HOME cannot ask that the court speculate as to the essential elements of its standing.

Similarly, in addressing HOME's standing to represent the rights of members who have been deprived of the benefits of interracial association, HOME and amici curiae, the City of Richmond and the National Committee Against Discrimination in Housing, suggest that this Court can *assume* the standing of HOME's members, and assume specifically that some HOME members reside in areas affected by Havens' alleged wrongful

acts. Brief for Respondents at 40-41; Brief for the City of Richmond at 7; Brief for the National Committee Against Discrimination in Housing at 26. Indeed, HOME now states in its brief that a member of HOME lives in Camelot Townhouses. Brief for Respondents at 40 n.37. HOME never sought to introduce such facts at the district court level, no doubt because its standing was not predicated on a representational standing theory. It cannot now ask this Court to speculate on facts not pled or otherwise offered, to support theories not argued below.

Furthermore, the only injury alleged by Coleman and Willis in the complaint is that they were deprived of the benefits of interracial association by petitioners' alleged steering.[7] As demonstrated in the Brief for Petitioners at 26-32, Coleman and Willis have alleged no plausible connection between their alleged injury and petitioners' acts. That such reasonable allegations of causal relationship are necessary is exemplified by this case, in which the facts alleged cannot, without more, lead logically to the conclusion that there is any causal nexus between the injury alleged and the defendants' acts. This is *not* to say, however, as respondents' wrongly interpret petitioners' position, that a "rigid geographic standard" should be imposed. Brief for Respondents at 25. Each plaintiff's standing must be determined in light of the circumstances, and a rule which precluded the sufficiency of reasonable allegations of injury to a broad geographic area would be as erroneous as one which held that *any* allegation of causal nexus is sufficient, no matter how incredible. For example, in

[7] Respondents in their brief at 22-24, misconstrue petitioners' argument that Coleman and Willis have alleged no injury in their status as testers. Petitioners do not suggest that testers do not have standing *per se* because they are testers. Rather, petitioners argue that Coleman's and Willis' status as testers is irrelevant to the standing question. Being testers is no disability to standing, as *Pierson v. Ray*, 386 U.S. 547 (1967); *Evers v. Dwyer*, 358 U.S. 202 (1958); and, indeed, *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), make clear. Nor does being testers automatically confer standing, as the Court of Appeals for the Fourth Circuit held in this case. Rather, testers have or lack standing because of the presence or absence of a distinct and palpable injury caused by the wrongful acts of which complaint is made. The Fourth Circuit erroneously held that Coleman and Willis have standing because they are testers. That decision must be reversed.

Fair Housing Council of Bergen County, Inc. v. Eastern Bergen County Multiple Listing Service, Inc., 422 F.Supp. 1071 (D.N.J. 1976), allegations of injury to an entire metropolitan county were properly held to be sufficient where defendants were four multiple listing services and five brokerage agencies which allegedly constituted the entire real estate industry in the county. 422 F.Supp. at 1074. It is not unreasonable to conclude that the entire real estate industry of a county, acting in concert, may affect the entire county by discriminatory housing practices. A similar conclusion would not be reasonable in the case at bar.

Although petitioners recognize that this Court cannot consider facts not presented below, and have avoided introducing such facts, even to counter facts improperly presented here by respondents, one particular allegation in respondents' brief aptly demonstrates why reasonable allegations of causal connection are necessary. With respect to the residence of Coleman and Willis, the complaint states only that they are "residents of the City of Richmond *or* Henrico County" (App. 13) (emphasis added), and that Havens' two apartment complexes are in Henrico County (App. 14). In footnote 19 of their brief, respondents add the further detail that "Coleman and Willis both reside in moderate income neighborhoods in the area north of the James River." Brief for Respondents at 23. On this fact, respondents attempt to predicate a reasonable causal connection between respondents' alleged deprivation of the benefits of interracial association and Havens' acts.

In fact, when Coleman's deposition was taken in the *Coles* case on March 7, 1979, she owned her own home at 1707 Mechanicsville Pike, in a neighborhood of two-story single family detached houses in the east end of the City of Richmond, approximately 14 miles from Camelot and Colonial Court. She apparently resides there now, although when her deposition was taken in a companion case on July 26, 1979, she stated that her address was 2210 Chateau Drive, an apartment complex *south* of the James River, but also in the City, approximately 18 miles from Havens' apartments. Willis, according to his deposition taken on February 29, 1979, in the *Coles* case, resided at 8 North Sheppard Street, near the Fan

District of the City of Richmond, an urban neighborhood of older single-family row houses, approximately 10 miles from Colonial Court and Camelot. He also owns his home. By contrast, Havens' apartments are modern multi-family developments in a suburban area of Henrico County. Colonial Court has 516 garden apartments; Camelot has 112 townhouse apartments.

These facts, of course, are not presented for their truth, but to emphasize the importance of requiring that facts supporting standing be pled at the district court level with sufficient particularity that a court can reasonably conclude that a plaintiff has standing. Respondents' incorrect suggestion in footnote 19 that Coleman and Willis reside in similar housing to that in Havens' apartments demonstrates that a brief on the merits in the United States Supreme Court is not the proper place to allege the causal nexus required for standing. Such facts must be pled in the district court.

Finally, the Fourth Circuit did *not* hold, as respondents state, "only that the district court's dismissal of the complaint on the pleadings, without giving respondents an opportunity to develop the facts to support their allegation of injury, was improper." Brief for Respondents at 24. Rather, that court held flatly, "All plaintiffs have standing. Willis and Coleman have standing as testers but, even if this were not so, they have alleged sufficient personal harm to give them standing" (App. 68). This decision is clearly wrong and must be reversed.

III. HOME AND COLEMAN LACK STANDING TO BRING THIS ACTION BASED ON A VIOLATION OF SECTION 3604(d) OF THE FAIR HOUSING ACT WHICH IS UNRELATED TO THE CAUSE OF ACTION ASSERTED IN THE COMPLAINT AND FOR WHICH THEY SUFFERED NO COGNIZABLE INJURY.

In this Court, for the first time, HOME and Coleman assert that they have standing to maintain this action under Section 3604(d) of the Fair Housing Act, which provides that it is unlawful:

> To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale or rental when such dwelling is in fact so available.

42 U.S.C. § 3604(d). Respondents' argument is based on the allegations of paragraph 13 of the Complaint which state that Coleman and white testers received different information concerning the availability of apartments (App. 16-17).

Clearly, the complaint in this case makes out *only* a cause of action against petitioners for racial steering of prospective lessees. Paragraph 1 of the complaint states, "This action involves the pattern and practices of defendants of denying housing on the basis of race and of racial steering" (App. 11), which is defined as deliberately affecting the housing location of members of racial groups because of race (App. 12). Furthermore, paragraph 11 specifies the nature of the alleged violation in terms which refer only to "customers," *i.e.*, actual prospective lessees. Finally, Coleman alleged that she has been denied the benefits of interracial association by the racial steering of prospective lessees and sought to represent a class of persons similarly affected (App. 17). Nowhere in this complaint is there a colorable claim that Coleman or HOME seek to maintain an action against petitioners for violation of Section 3604(d). Even paragraph 13, on which petitioners now seek to rely, is alleged only as *evidence* that petitioners steer prospective lessees (App. 16-17). Thus, it cannot be concluded that HOME and Coleman have maintained an action for violation of Section 3604(d) by this complaint.

Furthermore, it is clear that HOME and Coleman cannot predicate an action on racial steering of prospective lessees and base their standing on an injury which does not result from the asserted unlawful action. This is to say no more than that, when analyzing a plaintiff's standing, there must be a causal connection between the alleged wrongful acts—the acts of

which complaint is made—and the alleged injury.[8] The injury which Coleman would have this Court assume exists as a result of a violation of Section 3604(d) apparently is the receipt of different information from that given to white testers.[9] Brief for Respondents at 28. HOME's asserted injury apparently is the receipt of different information through its two testers.[10] Patently, these injuries, even if cognizable for Article III purposes, do not result from the alleged racial steering which is the subject of the complaint in this case. They result, if at all, from separate violations of Section 3604(d) not alleged in the complaint.

By contrast, of course, this Court has held that a person who is deprived of the benefits of interracial association by a defendant's discrimination—an injury which *results from* that discrimination, although indirectly— may bring an action under the Fair Housing Act which is predicated on those acts of discrimination. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972). This Court has never held that a plaintiff may ground her standing in acts *other* than those of which complaint is made, as Coleman and HOME here seek to do.

Finally, in the context in which this case arises, the asserted violation of Section 3604(d) does not assist HOME and Coleman in demonstrating standing. Although this Court has held that Congress can eliminate prudential considerations from the standing analysis, *see e.g. Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 100, Congress cannot deprive this Court of the power and the duty to determine whether

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[8] It is, of course, not to say that there need be a nexus between the *nature* of the injury and the rights asserted, a proposition explicitly rejected as a standing requirement in cases other than taxpayer challenges. *See e.g. Duke Power Company v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 78-79 (1978).

[9] In her brief, Coleman also suggests that this Court presume that "embarrassment, insult and humiliation" are cognizable injuries flowing from a Section 3604(d) violation. Brief for Respondents at 28-29. No such injury is pled, nor can it fairly be presumed to exist in the test situation described in the complaint.

[10] Of course, HOME has no racial identity, and did not receive misinformation because of race.

constitutionally mandated standing limitations are met. "A federal court cannot ignore this requirement without overstepping its assigned role in our system of adjudicating only actual cases and controversies." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 (1976).

Coleman tested Havens' compliance with the Fair Housing Act in the course of her employment with HOME. She received certain information as a result of her tests, presumably conveying that information to HOME. By seeking information on whether or not petitioners were steering, and by receiving precisely the information they sought, HOME and Coleman did not acquire any *personal stake* in the outcome of this litigation and did not suffer any personal injury redressable in an action against petitioners.

Thus, Coleman and HOME must base their standing on the alleged injuries, causal connection and remediability previously asserted, not on a violation of Section 3604(d) not alleged in the complaint. As demonstrated in petitioners' brief on the merits, both lack standing.

CONCLUSION

For the reasons stated herein and in petitioners' brief on the merits, the judgment of the Court of Appeals for the Fourth Circuit should be reversed and judgment entered for the petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Reply Brief for Petitioners have been served by mail on Vanessa Ruiz-de-Elejalde, Fried, Frank, Harris, Shriver & Kampleman, 600 New Hampshire Avenue, N.W., Suite 1000, Washington, D.C. 20037, counsel of record for the respondents.

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No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION and ROSE JONES,
Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS AND HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS CURIAE BRIEF OF THE CITY OF RICHMOND IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE CITY OF RICHMOND 2

I. Description of the City of Richmond 2

II. The City's Relationship to HOME 3

III. Purpose of the City of Richmond's Amicus Curiae Brief 4

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. HOME has Standing Under Article III of the Constitution 7

II. HOME has standing as Representative of its Members 9

III. HOME has Standing to Sue as an Entity 11

CONCLUSION 17

ADDENDUM 18

TABLE OF AUTHORITIES

Cases

Page

American Surety Company v. Schattenbauer, 257 F. 2d 4 (1958) 13

Village of Arlington Heights v. Metropolitan Housing Development Corp., 409 U.S. 205 (1972) 12

Baker v. Carr, 369 U.S. 186 (1962) 8, 9

Barrow v. Jackson, 369 U.S. 186 (1953) 8

Gladstone, Realtor v. Village of Bellwood, 441 U.S. 9. (1979) 6, 11, 14, 15, 16

Hunt v. Washington Apple Advertising Commission 432 U.S. 333 (1977) 6, 9

Linda R. S. v. Richard D., 410 U.S. 727 (1972) 9

Sierra Club v. Morton, 405 U.S. 727 (1972) 9, 12

Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 6, 11, 14, 16

United States v. SCRAP, 412 U.S. 669 (1973) 10, 11

Warth v. Seldin, 422 U.S. 490 (1975) 8, 9, 10

Statutes

U.S. Const. Art. III ..... passim

Fair Housing Act, 42 U.S.C. §3601 *et seq* ..... passim

Other Authorities

General Characteristics of the Population, by Census Tracts of Richmond, Henrico County, Chesterfield County (1970), Bureau of Census, U.S. Department of Labor ..... Addendum A, B

General Characteristics of the Population, by Census Tracts of Richmond, Henrico County, Chesterfield County (1978), Bureau of Census, U.S. Department of Labor ..... Addendum A, B

INTEREST OF THE CITY OF RICHMOND

The decision of the Fourth Circuit Court of Appeals will have a direct and immediate impact on housing development in the City of Richmond.

First, the Fourth Circuit's decision grants Housing Opportunities Made Equal (HOME), a fair housing opportunities organization in the Richmond Metropolitan Area, standing as a private attorney general to bring actions under the Fair Housing Act of 1968.

Second, the decision has a "chilling effect" on those real estate brokers and agents whose purpose and intent is to foster racially segregated communities in the Richmond Metropolitan Area.

Third, it creates a climate conducive to the establishment of natural racially integrated neighborhoods, rather than the artifically segregated neighborhoods that would result from impermissible racial steering practices.

Fourth, the decision granting HOME standing furthers the legislative intent of the Fair Housing Act of 1968 by according private parties the right to bring housing discrimination lawsuits against those parties determined to violate the law.

Fifth, the decision of the Fourth Circuit permits fair housing organizations such as HOME to implement contractual obligations with the federal, state and local governments to provide fair housing information and counseling services.

I
DESCRIPTION OF THE CITY OF RICHMOND

The City of Richmond ("CITY") is a municipal corporation duly organized under the laws of the Commonwealth of Virginia. The city is situated in central Virginia. It is surrounded by the County of Henrico to the north, east and west, and by Chesterfield County to the south.

The City has a population of 219,214, of which 112,357 are black and 106,857 are white. Henrico County's population is 180,735 of which 15% is black and 85% is white. Chesterfield County has a population of 126,134, with blacks comprising 9.7% of its residents.

There are distinct patterns of racial housing in the City and County of Henrico (County) as are illustrated on the map in Addendum A. There is a high concentration of blacks in the inner-city and fewer blacks residing on the outerlying sections of the City. The map also displays a higher concentration of blacks in the northern section of Henrico county and a low concentration of blacks in western Henrico County, especially in the area surrounding Camelot and Colonial Apartments, owned by Havens Realty Corporation.

Addendum B illustrates the movements of blacks in the City of Richmond from 1970 through 1978. The map displays a significant amount of movement of blacks into the southwestern section of the City. It also shows little movement of blacks into western Henrico and a significant rise in the number of blacks moving into northern Henrico.

Appendix C compares the movement of blacks into similar apartment complexes in the City and the County.

II
THE CITY'S RELATIONSHIP TO "HOME"

The City has been a source of HOME's funding since October, 1974. The City has contracted with HOME for the provision of housing information and counseling programs in the Richmond Metropolitan Area. The funding has increased from the initial contractual amount of $36,000 for fiscal year 1974-1975 to $90,000 for fiscal year 1980-81. HOME has been a quasi-public, but private, housing information and service organization in the Richmond Metropolitan area. Its membership includes residents from throughout the City of Richmond and the County. Friends of HOME listed on its letterhead include the City of Richmond's representatives in the Virginia General As-

sembly; four members of the Richmond City Council, including its Mayor; and the United States Congressman from the Richmond Metropolitan Congressional District.

HOME's contract with the City requires HOME to provide housing counseling and information services for the entire Richmond Metropolitan Area. This understanding was spelled out in letters dated April 10, 1977 and September 2, 1978 from Richmond City Manager, William J. Leidinger, to Barbara Wurtzel, Executive Director of HOME. (See Addenda D and E)

III
PURPOSE OF THE CITY OF RICHMOND'S AMICUS CURIAE BRIEF

The City's purpose for submitting this brief is to provide this Court with some insights into the setting and parties affected by the Fourth Circuit's decision to grant HOME and its "testers" standing to bring fair housing discrimination lawsuits. The City's brief will focus attention on the relationship HOME has with the City of Richmond, the jurisdiction that racial steering has a great impact upon. The brief directs the Court's attention toward those cogent issues and facts that adversely affect the housing market within the City and in neighboring Henrico County.

The City has neither the experience, resources nor personnel available to investigate and prepare housing discrimination matters for litigation. In order to facilitate its objectives of eradicating unfair housing practices, the City contracts with HOME to provide housing information and counseling services for the Richmond Metropolitan Area. The contractual relationship between HOME and the City City does not specifically require HOME to bring fair housing discrimination lawsuits. However, if it is to discharge its obligation to provide Richmond residents with accurate information and fair housing services, then it must pursue the remedies available to eliminate housing discrimination. A natural spinoff of HOME's housing information

services is the prosecution of lawsuits against real estate brokers and agents who engage in discriminatory housing practices.

The City does not enter into contracts with just any vigilante organization whose sole objective is to bring lawsuits to enforce the Fair Housing Act. It contracts with HOME because its goals and objectives are consistent with the City's fair housing policies. Furthermore, the City is aware of the fact that HOME has the personnel and resources required to perform its contractual obligations with the City. Where litigation is required to eliminate unfair housing practices, the City expects HOME to use that remedy if necessary.

Havens Realty Corporation's (Havens) practices of racial steering frustrates HOME's ability to fulfill its contractual obligations with the City. Where HOME receives inaccurate information from Havens and knowingly passes this false information on to its clients, then HOME, itself, becomes a violator of the Fair Housing Act. The integrity and credibility of HOME will then be second-guessed by the City. HOME's continued funding through the City would consequentially be greatly jeopardized.

Havens racial steering practices proliferates the flight of white Richmonders to the surrounding counties. At the same time black Richmonders have no choice but to remain in the City or live in areas relegated to blacks in Henrico County. Indeed such practices foster an artifically segregated Richmond community -- the City becomes a "black ghetto" and the County a "white ghetto".

The Fourth Circuit's broad construction of the Fair Housing Act in this case is lauded by the City. The decision to accord standing to HOME and its "testers" to litigate Fair Housing Act claims is another step toward eliminating the illegal vexatious practice of racial steering.

Discriminatory housing practices have become subtle and more sophisticates since the enactment of the Fair Housing Act in 1968. The decision of the Fourth Circuit providing HOME with standing to sue is another arm of enforcement against those individuals and companies

whose purpose and intention is to violate the Fair Housing laws.

SUMMARY OF ARGUMENT

This Court must determine whether HOME, a fair housing organization, has alleged sufficient injury to its membership or itself as an entity to entitle it to standing to sue under the Fair Housing Act. 42 U.S.C. Section 3601, *et seq.*

HOME, as representative of its membership, and as an organization, has alleged sufficient injury to sue under the Fair Housing Act. It should have been given the opportunity to prove at trial that, 1) it is truly representative of its membership that has been injured; 2) it has been injured to the extent that it cannot fulfill its contractual obligations with the City, State and HUD; and 3) that it was acting as a "private attorney general" to open up the doors of housing in the Richmond Metropolitan Area to people of all races, colors, sexes, religions and national origins.

HOME has alleged sufficient injury as an entity to confer standing upon it. The Fourth Circuit's decision is consistent with this Court's ruling in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205(1972) and *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91(1979), and that the trial court erred when it dismissed HOME prior to hearing any evidence regarding the manner in which HOME was injured as a result of Havens actions.

The City further submits that HOME has alleged sufficient injury to its members so as to confer upon it standing to sue Havens as representative of its members. HOME alleged sufficient injury in its Complaint to survive Havens motion to dismiss; and the trial court erred by dismissing HOME prior to reviewing any evidence as to whether HOME has suffered injury to confer representative standing upon it under the standards enunciated by this Court in *Hunt* v. *Washington, Apple Advertising Commission*, 432 U.S. 333 (1977).

ARGUMENT

I. HOME HAS STANDING UNDER ARTICLE III OF THE CONSTITUTION

Housing Opportunities Made Equal (HOME) is a Virginia non-profit corporation whose purpose is to eliminate unlawful discriminatory housing practices in the Richmond Area.

> HOME activities include: assisting individuals of all races in obtaining housing in the metropolitan area through the operation of a housing counseling service; investigating allegations of discrimination and referring complaints to appropriate federal and state authorities; conducting independent investigations of real estate brokers in the metropolitan area to determine whether housing is being made available without regard to race; and taking appropriate steps to eliminate any racial discriminatory housing practices it may have found that exist. (Appendix 65)

HOME has a membership of approximately 600 individuals residing throughout the Richmond Metropolitan Area.

HOME has been under contract with the City of Richmond since 1974 to provide the services listed in the activities stated above. The City's satisfaction with its work is reflected in the increases in funding from $36,000 in 1974 to $90,000 in 1981. Since 1974, more than $450,000 have been funneled through the City of Richmond to HOME for fair housing services.

HOME brought this action under the Fair Housing Act of 1968, 42 U.S.C. Sections 3601, 3604, 3612(a). It alleged in the Complaint that it "has been frustrated by defen-

dants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services."

> HOME further alleges in its Complaint that its members have as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial association that arises from living in integrated communities free from discriminatory housing practice . . .
> (Appendix 68)

The trial court dismissed HOME as a plaintiff in this lawsuit for lack of standing. (Appendix 32).

The Court of Appeals unanimously reversed the trial courts decision and ruled that HOME and its "testers" have standing to sue under the Fair Housing Act. (Appendix 63).

This Court must now decide on the question of whether HOME and its "testers" have alleged sufficient injury under Article III of the Constitution to accord them standing to litigate Fair Housing Act lawsuits.

The question of standing is whether the litigant is entitled to have the court decide the merits of a dispute or of particularized issues. This injury involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. E.g. *Barrow* v. *Jackson*, 346 U.S. 249, 255, 256 (1953); *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Article III. Justiciability is the threshold question in every federal case determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy"

as to warrant his invocation of federal court jurisdiction and to justify the exercise of the court's remedial powers on his behalf. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962).

Although standing in no way depends on the merits of the plaintiff's contention that the particular conduct is illegal, it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Article III may exist solely by virtue of the "statutes creating legal rights, the invasion of which creates standing". *Warth, supra,* at 500; *Linda R.S.* v. *Richard D.* 410 U.S. 614, 617 at n. 3 (1973); *Sierra Club* v. *Morton* 405 U.S. 727, 732 (1972).

II. A. HOME HAS STANDING AS REPRESENTATIVE OF ITS MEMBERS

The gravamen of the question of HOME's standing as the representative of its membership lies in this Court's interpretation of *Hunt* v. *Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

This Court defined representative standing:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. (Appendix 75)

The trial court dismissed HOME without giving it the opportunity to prove that its members lived in the community affected by Havens' racial steering practices. As a matter of fact, a member of HOME has resided in Camelot apartments during all the relevant time of this lawsuit.

This Court ruled in *Warth* v. *Seldin, supra*, that:

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations in favor of the complaining party. At the same time, it is within the trial court's power to allow or to require the plaintiff to supply by amendment to the complaint or by affidavit, further particularized allegations of fact deemed supportive of plaintiff's standing.

Id. at 501, 502.

The factual allegations in the case at bar are unusually similar to those in *United States* v. *SCRAP*, 412 U.S. 669 (1973). In *SCRAP*, the plaintiffs alleged that the Interstate Commerce Commission's decision to suspend tariff surcharges on railroads would cause its members "economic, recreational and aesthetic harm". *United States* v. *SCRAP, supra*, at 675, 676. On the issue of standing this Court stated:

> We cannot say on these pleadings that the allegations which, if proved, would place them squarely among those persons injured in fact by the commission's action and entitled under the clear import of Sierra Club. The District Court was correct in *denying* appellant's motion to dismiss the complaint for failure to allege sufficient standing to bring the lawsuit. (emphasis added)

United States v. *SCRAP, supra*, at 689, 690.

The trial court erred by dismissing HOME and its "testers" without giving them the opportunity to either amend the complaint or proffer affidavits to support their particularized allegations of injury. If the allegations against Havens were in fact untrue, then summary judgment would have been the appropriate remedy rather than a motion to dismiss. *United States* v. *SCRAP, supra*, 689.

The court of appeals correctly ruled that HOME has standing to sue on behalf of its members. This Court ruled in *Trafficante* v. *Metropolitan Life Insurance Co. supra*, at 209, that individuals are persons "aggrieved" as defined in Section 810(a) of the Fair Housing Act, whenever such persons claim to have been injured by a discriminatory housing practice.

The allegations stated in HOME's complaint rests squarely within the standing requirements recognized by this Court in *SCRAP*, *Trafficante* and *Village of Bellwood* to confer upon it the right to sue for discriminatory housing practices in federal courts. To deny HOME standing as representative of its members would be completely oblivious to this Court's prior decisions on standing, and effectively disarm the "private attorneys general" conceived of by the Fair Housing Act to enforce the mandates of the law.

III. HOME HAS STANDING TO SUE AS AN ENTITY

HOME alleges in its complaint that it has been frustrated in its efforts to assist equal access to housing through counseling and other referral services. As noted earlier, HOME has been under contract with the City to provide housing information and counseling services since 1974. Through various forms of correspondences, HOME has placed all realtors in the Richmond Metropolitan Area, including Havens, on notice of its contractual relationship with the City, State and Federal governments.[1]

HOME has been injured by Havens in its ability to

[1] A letter and questionnaire listing HOME's activities and stating that it was funded by the local, state and federal governments was sent to all real estate brokers and agents during each of the years from 1974 through 1980. A follow-up telephone call was made to each real estate broker who did not respond to the questionnaire in order to obtain information regarding the apartment sizes, cost of rental, and renter qualifications. Each correspondence detailed HOME's activities and solicited the assistance of real estate brokers and agents in its endeavors.

perform housing information and counseling services under its contract with the city. The injury suffered by HOME in this regard is strikingly similar to the injury sustained by the non-profit developer in *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In *Arlington Heights* this Court stated:

> MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about problem of general interest. See *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). The specific project MHDC intends to build, whether or not it will generate profits, provides that "essential dimension of specificity" that informs judicial decision-making.

Id. at 263.

The injury suffered by HOME is more than an abstract concern for the development of an integrated Richmond Metropolitan Area. But rather HOME's ability to discharge its responsibilities under its contract with the City, as well as, the state and federal governments, and the community in general, is thwarted by the discriminatory housing practices of Havens.

Havens' racial steering practices, in fact, amount to tortiously interfering with HOME's ability to perform its contractual duties with the City. Even though neither the City nor HOME have pursued an action of tortious interference with contract against Haven; indeed, all the essential elements of such a claim are present in this case:

(1) There exist a contract between the City and HOME.

(2) Havens has knowledge or should have had knowledge of the contract through the correspondences forwarded to it by HOME and ordinances passed by Richmond City Council.[2]

(3) Havens has deliberately steered blacks away from Camelot and Colonial Apartments in violation of the Fair Housing Act, thereby impeding HOME's ability to provide accurate information on fair housing in the Richmond Metropolitan Area.

(4) There is no justification for Havens' racial steering practices.

(5) HOME is damaged to the extent that it cannot properly perform its contractual obligations to the City.

See 45 *Am Jur* 2d, Interference, 39; and *American Surety Company* v. *Schattenbauer,* 257. F. 2d, 4, 11 (1958).

Without question, HOME has been frustrated in its efforts to provide fair housing information services by Havens' racial steering practices. HOME's inability to provide accurate housing information could in fact lead to the loss of funding from the City, and even the state and federal governments.

The integrity of HOME as a fair housing organization is demeaned by Havens' racial steering practices. HOME is recognized in the Richmond Metropolitan Area as the agency that monitors and enforces fair housing opportunities. If it is unable to provide those services, then its *raison d'etre* will be completely undermined. Without an effective fair housing organization such as HOME,

[2]City of Richmond Ordinance No. 77-58-69 allocated $36,000 in Community Development Block Grant funds to HOME for housing and counseling services in 1977.

the residents of the City and its surrounding counties would be deprived of the enforcer of important social, professional, business and economic, political and aesthetic benefits of interracial association that arise from living in an integrated community free from discriminatory housing practices. Fair Housing Act violators such as Havens would then be free to carry out all their racially discriminating housing policies without fear of vengeance.

The Fair Housing Act was designed to give private parties, such as HOME, the right to enforce the mandates of this law. Under the Act, the Department of Housing and Urban Development (HUD) has no enforcement powers. This limitation on federal agency enforcement powers would seem to infer that it was the intention of Congress to delegate the right to enforce the Act to private parties. Indeed, this Court recognized private enforcement of the Act in *Trafficante* v. *Metropolitan Life Insurance Company*, 409 U.S. 205 (1972):

> Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits in which . . . the complainants act not only on their own behalfs, but also "as private attorneys general in vindicating the policy that Congress considered to be of the highest priority."

Id. at 211

The City of Richmond is committed to fair housing opportunities for all people in the Richmond Metropolitan Area. Because the City possesses neither the experience, personnel or resources to thoroughly develop and implement its fair housing program, it delegates that responsibility to HOME. Certainly, the City would have standing under this Court's ruling in *Gladstone, Realtor* v. *Village of Bellwood*, 441 U.S. 91 (1979)

> The constitutional limits of respondents' standing to protest the intentional segregation of their community do not vary simply because that community is defined in terms of city blocks rather than apartment buildings. Rather, they are determined by the presence or absence of "distinct and palpable injury" to respondent resulting from petitioner's conduct.

Village of Bellwood, supra, at 114.

It is therefore fair to reason that HOME should concomitantly be accorded the same standing right as the City, since it is under contract to, and in fact performs as an extension of the City's fair housing program.

The need for organizations such as HOME becomes obvious when one observes the map of the City and Henrico County in Addendum A. Distinct lines of demarcation separate black neighborhoods from white communities. The Richmond Metropolitan Area is manifestly the victim of discriminating realtors such as Havens, who steers blacks away from their neighborhoods and encourages whites to move therein.

The affects of discriminatory housing practices spill over into every aspect of life in the Richmond Metropolitan Area, particularly in the City of Richmond. The City is divided into nine wards – five predominantly black and the other four predominantly white. Each ward's representation on City Council mirrors its racial composition. The racial makeup of these wards is the result of many years of discriminatory housing practices, where blacks have been steered into certain communities and whites directed into other areas of the City.

The adverse consequences attendant upon a "changing" neighborhood is evident in the racial composition of City and County public school systems. The City's public school system is 84% black, while the County school system is 80% white. Each school system operates independently. A *de facto* segregated school system in the

Richmond Metropolitan Area has therefore developed from the communities' housing patterns. The City and the County have thereby been injured as a result of its segregated school systems. (See *Village of Bellwood, supra,* at 110, footnote 24.)

The map in Appendix B indicates that the Richmond Metropolitan Area is undergoing changes in its neighborhood patterns. As this Court stated in *Bellwood,* it is unimportant in any analysis of standing that "a segregated community was prevented from becoming integrated" because of unfair housing practices, or "that an integrated neighborhood is becoming a segregated community" because of racial steering practices. In both situations, the deprivation of the benefits of interracial associations constitutes the alleged injury. *Gladestone, Realtor* v. *Villiage of Bellwood,* supra, at 113, n. 26.

Not only are the residents of Camelot and Colonial Apartments, owned by Havens, injured as a result of racial steering, but the entire Richmond community.

> The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is as Senator Javits said in supporting the bill, "the whole community", 114 Cong. Rec. 2706, and, as Senator Mondale who drafted Section 810(a) said, the reach of the proposed law is to replace the ghetto "by truly integrated and balanced living patterns".

Trafficante v. *Metropolitan Life Insurance Co. supra,* at 210.

The desire of Richmonders to live in an integrated community is undermined by the racial steering practices of Havens in this case. Havens has only two apartment complexes in the Richmond Metropolitan Area. However, the segregated patterns of housings illustrated in the map in Addendum A reveal a widespread practice of racial steering in the City and County.

The City urges this Court to uphold the decision of the

court of appeals below to grant HOME standing to sue racist real estate broker for fair housing violations. Denying HOME standing, will have the effect of stripping it of its ultimate weapon against unfair housing practitioners.

The City urges this Court to send out a signal to unfair housing realtors that their practices are against the law, and that organizations such as HOME can and will sue them when they violate the fair housings laws.

CONCLUSION

The purpose of the Fair Housing Act of 1968 is to eliminate discrimination in housing in America. The Act makes unlawful, practices and conduct that discriminates against individuals because of his or her race, color, religion, sex or national origin. The Act codifies the feelings of fair-minded Americans who wish to live in a free integrated society.

The practices of Havens Realty Corporation in this case are deplorable. Its racial steering practices would go virtually unheeded, but for a fair housing organization in the City of Richmond, known as HOME. Havens' illegal housing practices were recognized by HOME, and the appropriate lawsuit was commenced to eliminate this unlawful behavior.

HOME's objectives, goals and policies are to eliminate racial discrimination in housing in the Richmond Metropolitan Area. It has a contractual responsibility to the City to provide fair housing opportunities for the entire Richmond area. HOME has a moral duty to its members and community in general to take the necessary steps, including litigation, to eradicate unfair housing practices. It has been frustrated and injured as a result of Havens' racial steering practices. The entire Richmond community has been injured because of discriminatory housing practices.

It was the intention of Congress with the passage of the Fair Housing Act to arm private parties, such as HOME, with standing to sue to eliminate unfair housing practices.

It is for these reasons, the City submits that this Honorable Court should accord HOME standing to sue under the Fair Housing Act and affirm the decision of the court of appeals.

Respectfully submitted,

Reginald M. Barley
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City of Richmond
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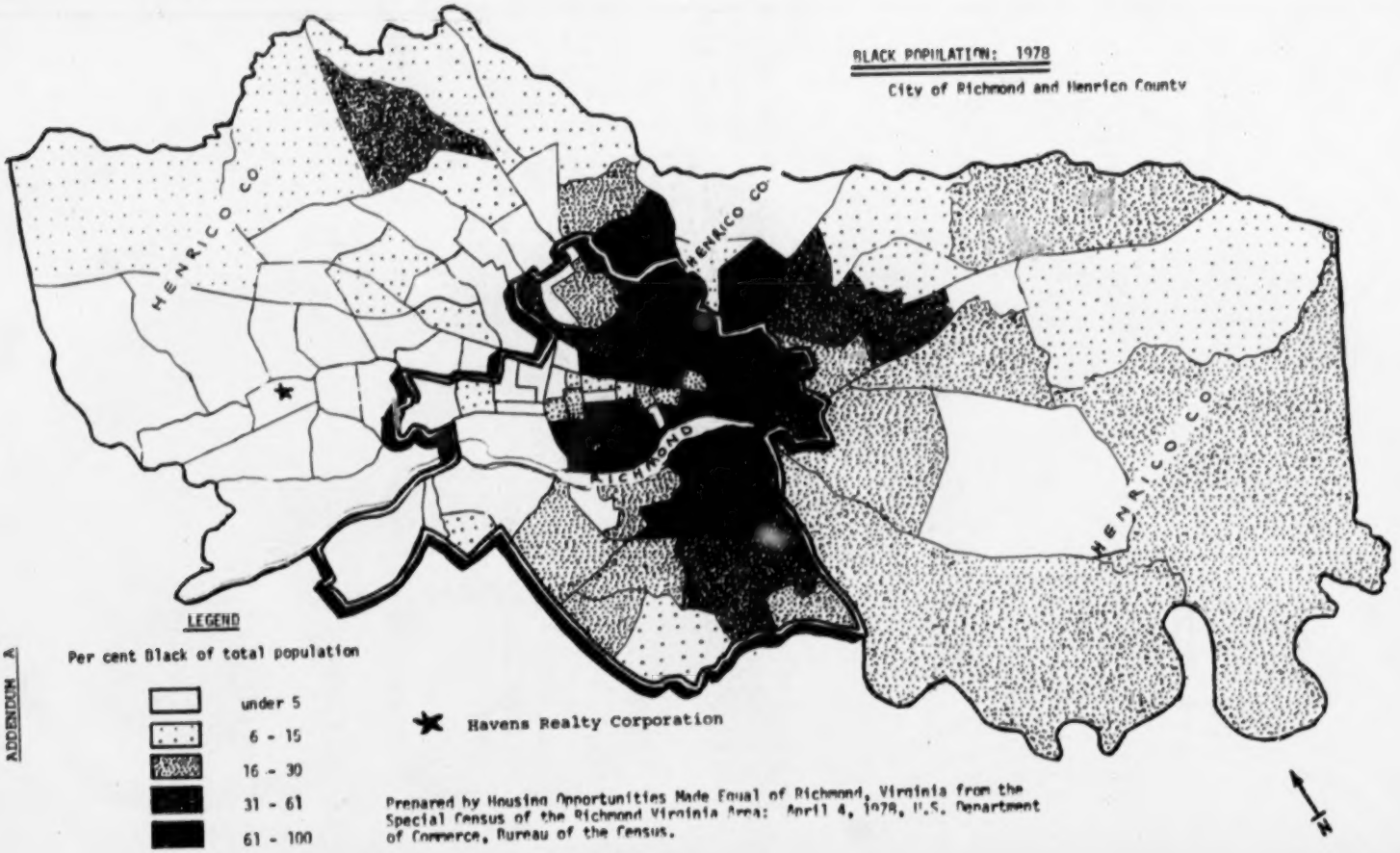
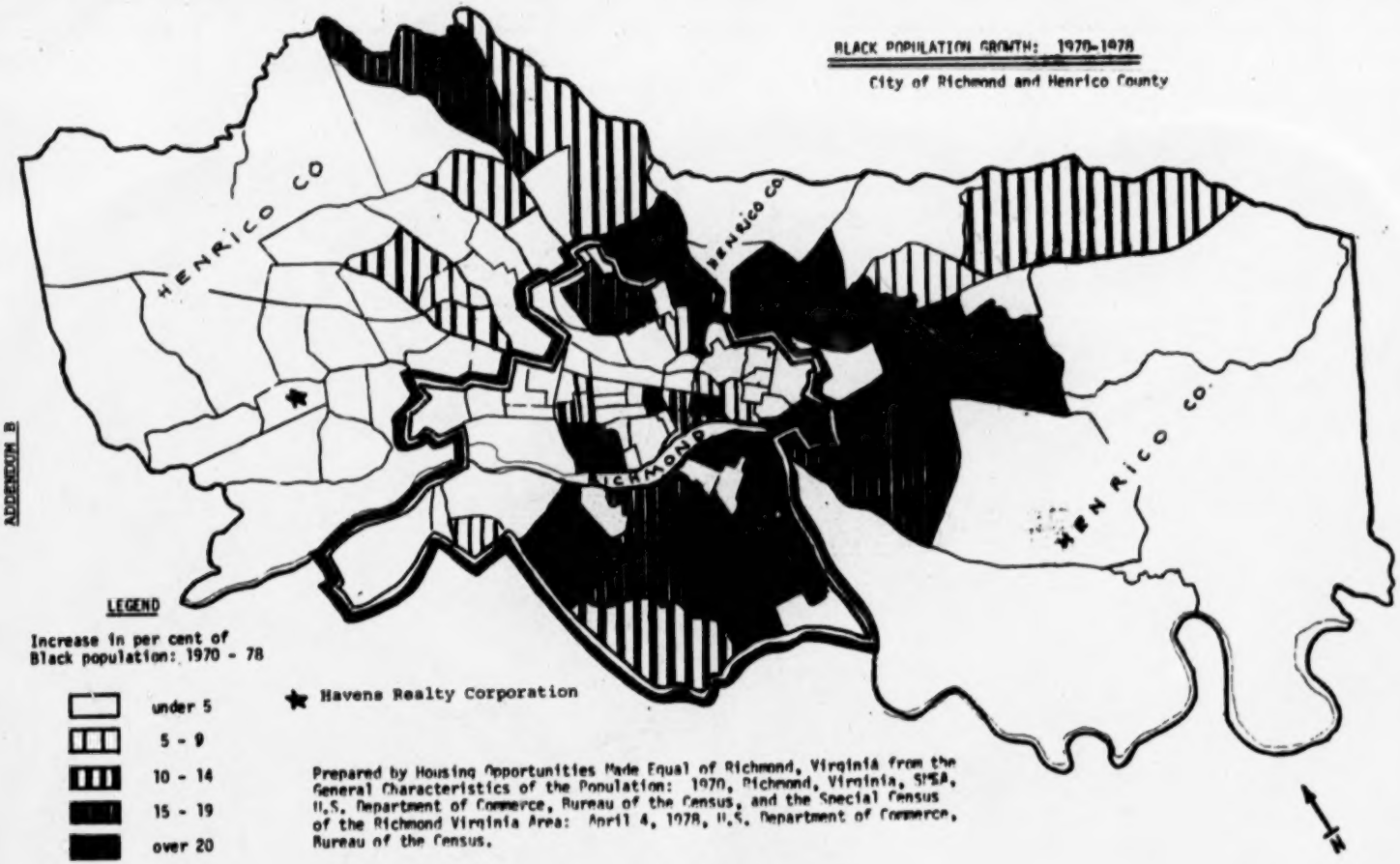
ADDENDUM A


BLACK POPULATION: 1978
City of Richmond and Henrico County
HENRICO CO
HENRICO CO
RICHMOND
HENRICO CO
LEGEND
Per cent Black of total population
under 5
6 - 15
16 - 30
31 - 61
61 - 100
Havens Realty Corporation
Prepared by Housing Opportunities Made Equal of Richmond, Virginia from the Special Census of the Richmond Virginia Area: April 4, 1978, U.S. Department of Commerce, Bureau of the Census.
N

ADDENDUM B


BLACK POPULATION GROWTH: 1970-1978
City of Richmond and Henrico County
HENRICO CO
HENRICO CO
RICHMOND
HENRICO CO
LEGEND
Increase in per cent of Black population: 1970 - 78
under 5
5 - 9
10 - 14
15 - 19
over 20
Havens Realty Corporation
Prepared by Housing Opportunities Made Equal of Richmond, Virginia from the General Characteristics of the Population: 1970, Richmond, Virginia, SMSA, U.S. Department of Commerce, Bureau of the Census, and the Special Census of the Richmond Virginia Area: April 4, 1978, U.S. Department of Commerce, Bureau of the Census.
N

ADDENDUM C

DISTRIBUTION OF APARTMENT COMPLEXES IN THE SAME PRICE RANGE AS COLONIAL COURT
(over map of Black Population Growth: 1970-1978)

City of Richmond and Henrico County

LEGEND

⊙ Location of apartment complexes in the same price range as Colonial Court ($226 - 250 in February of 1978)

Prepared by Housing Opportunities Made Equal of Richmond, Virginia from: General Characteristics of the Population - 1970, Richmond, Virginia, SMSA, U.S. Department of Commerce, Bureau of the Census; the Special Census of the Richmond, Virginia Area: April 4, 1978, U.S. Department of Commerce, Bureau of the Census; and, the Apartment Seekers Guide, Feb. 1978, published by Housing Opportunities Made Equal of Richmond, Virginia.

ADDENDUM D

City of Richmond
Office of the City Manager

900 East Broad Street, Richmond, Virginia 23219
804-780-5386

September 2, 1977

Mrs. Barbara Wurtzel, Executive Director
H.O.M.E.
503 East Main Street
Richmond, Virginia 23219

Dear Mrs. Wurtzel:

The Housing Action Plan, completed last year by the City, included a number of recommendations for meeting the housing needs of our citizens. Expanded rehabilitation activities, more effective code enforcement, Section 8 housing opportunities, a tool-loan program and public information programs were the subject of numerous recommendations.

One of the areas of concern expressed in the report is the problem of the growing disparity between the City and the surrounding suburbs insofar as the number of poor (and often subsidized) families who seek and find housing opportunities. In order that the region not experience a worsening of the concentration of such families in any neighborhood or governmental jurisdiction, the report recommends that care be exercised in referral assistance, especially where relocation benefits are available.

By this letter, I am asking that your agency give particular attention to meeting the objective of metropolitan-wide housing counseling, in view of the obvious trend toward increased job opportunities and a truly diversified housing inventory outside the City. If the City Administration can be of further help or if you wish to discuss the matter, please do not hesitate to contact me.

Sincerely,

William J. Leidinger
City Manager

CC: Assistant City Manager Deese
Assistant City Manager Todd
Director of Planning and Community Development
Director of Developmental Programs
Executive Director, RR&HA

WJL:sam

ADDENDUM E

City of Richmond
Office of the City Manager

900 East Broad Street, Richmond, Virginia 23219
804 • 649-8386

April 10, 1978

Ms. Barbara Wurtzel, Executive Director
Housing Opportunities Made Equal
503 East Main Street
Richmond, Virginia 23219

Dear Ms. Wurtzel:

The Housing Action Plan, completed by the City in 1976, indicated a number of objectives to be kept in mind as we attempt to meet our citizens' housing needs.

One such objective relates to the problem of a growing disparity in the number of poor families and households who seek housing opportunities in the City versus the surrounding counties. So that no single governmental jurisdiction or neighborhood be subject to an increasing concentration of such families, the Housing Action Plan recommended that referral assistance be judiciously rendered. This is especially the case when relocation benefits are involved.

Therefore, this letter is to serve as a reminder to my September 2, 1977 correspondence in which I requested that your agency give particular attention to the objectives of ensuring that those families and households counseled are apprised of metropolitan-wide housing opportunities.

I would appreciate receiving a brief overview of your agency's activities and accomplishments towards the above-mentioned goal by the end of April. Additionally, I would like you to report, on a monthly basis, the number of clients referred to and number placed in housing outside the City of Richmond. The monthly information can be incorporated in your monthly reports to the Department of Developmental Programs.

Sincerely,

William V. Leidinger
City Manager

cc Assistant City Manager Deese
Assistant City Manager Todd
Director of Planning and Community Development
Director of Developmental Programs
Executive Director, RRHA
Principal Planner, Program Planning

Office-Supreme Court, U.S.
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SEP 2 1981
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CLERK

No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HAVENS REALTY CORPORATION and ROSE JONES,
Petitioners,

v.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE CENTER FOR NATIONAL POLICY REVIEW, AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE*

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INDEX

	Page
Table of Authorities	ii
Interest of *Amici Curiae*	1
Statement	4
Summary of Argument	7
ARGUMENT	
I. In Light of Events Which Have Occurred Subsequent To The Entry Of Judgment Below, This Court Should Not Reach The Merits Of This Case	8
II. Alternatively, This Court Should Remand For Further Development And Narrowing Of The Issues	11
Conclusion	15
Appendix—The Standing of "Testers" To Challenge Racial Steering Under the Fair Housing Act of 1968	1a

TABLE OF AUTHORITIES

Cases: Page

Coles v. Havens Realty Corp., 633 F.2d 384 (4th Cir. 1980) 13, 14
Coles v. Havens Realty Corp., Civ. No. 79-0024 (E.D. Va., Feb. 17, 1981), reprinted in EQUAL OPP. HOUS. ¶ 18,031 (P-H) 6, 7, 8, 9, 12
County of Los Angeles v. Davis, 440 U.S. 625 (1979) 4, 11
DeFunis v. Odegaard, 416 U.S. 312 (1974) 9
Evers v. Dwyer, 358 U.S. 202 (1958) 4a
Fair Housing Council v. Eastern Bergen County MLS, 422 F. Supp. 1071 (D.N.J. 1976) 1a
Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979) 4, 10, 11, 12, 13, 14, 15
Grant v. Smith, 574 F.2d 252 (5th Cir. 1978) (per curiam) 4a
Indiana Employment Security Div. v. Burney, 409 U.S. 540 (1973) 9, 11
Johnson v. Board of Educ. of Chicago, —— U.S. ——, 66 L. Ed. 2d 162 (1980) 4, 11
Meyers v. Pennypack Woods Home Ownership Ass'n, 559 F.2d 894 (3d Cir. 1977) 1a, 4a
Minnick v. California Dep't of Corrections, 49 U.S.L.W. 4609 (June 1, 1981) 9, 10, 13
Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975) .. 1a
Northside Realty Associates, Inc. v. United States, 605 F.2d 1348 (5th Cir. 1979) 4a
Pierson v. Ray, 386 U.S. 547 (1967) 4a
Sierra Club v. Morton, 405 U.S. 727 (1972) 14
Smith v. YMCA of Montgomery, 462 F.2d 634 (5th Cir. 1972) 4a
South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co., 145 U.S. 300 (1892) .. 9
Swift & Co. v. Hocking Valley R.R., 243 U.S. 281 (1917) 9
Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) 13, 2a
Turner v. A.B. Carter, Inc., 85 F.R.D. 360 (E.D. Va. 1980) 6, 10

TABLE OF AUTHORITIES—Continued

	Page
United States v. Hunter, 459 F.2d 205 (4th Cir.), cert. denied, 409 U.S. 934 (1972)	4a
United States v. Real Estate One, Inc., 433 F. Supp. 1140 (E.D. Mich. 1977)	1a, 4a
United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973), modified as to relief and aff'd, 509 F.2d 623 (9th Cir. 1975)	3a
Warth v. Seldin, 422 U.S. 490 (1975)	12, 13
Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., 429 F. Supp. 486 (E.D.N.Y. 1977)	3a, 4a
Zuch v. Hussey, 394 F. Supp. 1028 (E.D. Mich. 1975), aff'd and remanded, 547 F.2d 1168 (6th Cir. 1977) (per curiam)	1a
Statutes and Rules:	
42 U.S.C. § 1982	6, 12
42 U.S.C. §§ 3601 et seq.	6
42 U.S.C. § 3601	2a
42 U.S.C. § 3604(a)	1a, 2a, 3a
42 U.S.C. § 3604(b)	3a
42 U.S.C. § 3604(c)	4a
42 U.S.C. § 3604(d)	3a
F.R. Civ. P. 23(b)(2)	6
F.R. Civ. P. 54(b)	6, 7, 8
Supreme Court Rule 17.1(c)	12
Other Authorities:	
114 Cong. Rec. (1968)	2a, 3a
EQUAL OPP. HOUS. ¶ 19,905 (P-H)	9

IN THE

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HAVENS REALTY CORPORATION and ROSE JONES,
Petitioners,

v.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE CENTER FOR NATIONAL POLICY REVIEW, AND THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICI CURIAE*

INTEREST OF *AMICI CURIAE* *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. Through its national office in Washington, D.C. and local Lawyers' Committee such as the Washington, D.C. Lawyers' Committee for Civil Rights Under

* The parties' letters of consent to the filing of this brief are being filed with the Clerk pursuant to Rule 36.1.

Law, the organization has over the past eighteen years enlisted the services of thousands of members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit organization incorporated under the laws of the State of New York in 1940. It was formed to assist blacks to secure their constitutional rights by the prosecution of lawsuits. Its purposes include rendering legal aid gratuitously to blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf, and its charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The Fund is independent of other organizations and is supported by contributions from the public.

Attorneys employed by or associated with the Legal Defense Fund have participated in numerous fair housing cases in the federal courts, including this Court, *e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948), and have submitted briefs *amicus curiae* in other such cases, *e.g.*, *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

The Center for National Policy Review (CNPR) is a privately-funded public interest law center located in the Catholic University School of Law. Founded in 1970, CNPR represents the interests of the civil rights community within the federal policy-making and administrative process. Because the need for the enforcement of the right to secure housing free of discrimination is of primary importance, CNPR has been particularly concerned with the administration and implementation of Title VIII (Fair Housing Act of 1968).

The Washington Lawyers' Committee for Civil Rights Under Law was founded in 1968 to help focus the energies of the private bar on civil rights and poverty issues affecting the greater Washington area. The Washington Committee has organized panels of volunteer attorneys to work on cases affecting individuals and important law reform issues in the areas of equal housing and employment opportunities, narcotics addiction, the parole process, and immigration. More than 650 volunteer attorneys from over 80 area law firms have worked on Washington Committee projects, expending (for example) in 1978 well over 20,000 hours of lawyers' time.

All of the *amici* organizations, their local committees, affiliates and volunteer attorneys thus have been actively engaged in providing legal representation to those seeking relief under federal civil rights legislation. Their litigation includes cases raising housing discrimination issues similar to those presented here.

This case raises a welter of questions concerning the standing of various parties plaintiff and the timeliness of the filing of the action. Determination of those issues turns on the peculiar facts and circumstances involved, but the Court's decision will also have a significant effect upon other lawsuits under the Fair Housing Act of 1968 and similar statutes. This is especially so because petitioners raise standing claims under Article III of the Constitution.

Amici believe that the Court should proceed cautiously, however, in addressing the issues in this case. As we show below, events which have transpired since the entry of the judgment below, about which the Court has not yet been informed, have worked a significant material change in the factual posture of this case and may render it moot.

For this reason, *amici* suggest that the most appropriate disposition of this matter would be to dismiss

the writ as improvidently granted. Alternatively, the Court could remand the case to the district court for consideration of possible mootness, and for reconsideration of the trial court's earlier ruling in light of this Court's intervening decision in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). *See, e.g., Johnson v. Board of Educ. of Chicago*, —— U.S. ——, 66 L. Ed. 2d 162 (1980) (remanding for consideration of matters raised in Suggestion of Mootness and responses thereto). That disposition would require vacating the opinion and judgment below. *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 and accompanying text (1979).

Even if the Court does not wish to dispose of the case in this fashion, *amici* submit that it is neither necessary nor appropriate to reach and decide all of the various issues which have been raised and briefed by the parties as a result of the alternative holdings anounced by the Fourth Circuit. The Court should adhere to its practice of adjudicating constitutional questions only when necessary to the disposition of a case. Because the substantive issues presented by petitioners in this matter are inextricably interrelated on the present record, they cannot be appropriately narrowed for decision by this Court in the absence of further proceedings below. The remand for this purpose which *amici* suggest would isolate and sharpen the questions which *must* be decided here, leaving for another day those which should be reached only in the context of a different case in which their determination will be critical.

STATEMENT

The relevant facts of record in this matter are not disputed. In the spring of 1978, Coleman and Willis visited the offices of petitioner Havens to obtain information about apartment availability for their employer, respondent H.O.M.E. (Housing Opportunities Made

Equal). Subsequently, Coleman, Willis, and other H.O.M.E. employees conducted "tests" to determine whether prospective lessees of different races were given the same information about availability in two apartment complexes managed by petitioner Havens Realty. These "tests" involved successive visits and inquiries about vacancies of Havens' employees by Coleman, who is black, and Willis, who is white (or by another white H.O.M.E. employee, John Barr, who is not a respondent in this case). The "tests" indicated that Havens employees were "steering," either by directing blacks who inquired about apartment availability only to one of the two complexes, or by representing to them that there were no vacancies—while whites who inquired were told of apartments available in either development.

Coleman and Willis were "testers" because at the times they visited Havens' offices, they had no present intention to enter into a lease of any apartment which might be available in either complex; rather, their motivation was to determine whether Havens treated black and white prospective lessees differently on account of race. The complaint alleges that both Coleman and Willis are "residents of the City of Richmond or Henrico County . . . ."

On July 13, 1978, a black man named Paul Allen Coles, who did wish to reside in one of the apartment developments handled by Havens, inquired about availability from Havens' employees. Coles was informed that the only apartment available was in the other complex, to which the earlier "tests" indicated that blacks were being steered. Later that same day, the complaint alleges, white "tester" John Barr visited Havens' offices and was told of an available apartment in the complex in which Coles had wished to reside.

This lawsuit, charging Havens Realty with racial steering in violation of the Fair Housing Act (Title VIII

of the Civil Rights Act) of 1968, 42 U.S.C. §§ 3601 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. § 1982, was filed 180 days later. Plaintiffs in the suit were Coles, Coleman, Willis, and H.O.M.E. Broad injunctive relief, damages, and attorneys' fees were sought. In response to Havens' motion, the district court dismissed all of the plaintiffs except Coles, on the grounds that Coleman, Willis and H.O.M.E. lacked standing, and that the suit was filed too late with respect to Coleman and Willis in any event since their last "test" of Havens' practices occurred more than 180 days prior to the filing of the suit.

Respondents were then granted a final judgment as to the standing and timeliness issues, pursuant to F.R. Civ. P. 54(b), and they appealed to the Fourth Circuit, which on September 11, 1980 rendered its opinion and judgment reversing the district court's rulings. This Court granted *certiorari* to review that judgment on April 20, 1981.

The additional relevant facts about which the Court appears not yet to have been advised are as follows:

After respondents appealed with respect to plaintiffs Coleman, Willis and H.O.M.E., proceedings in the district court continued on behalf of plaintiff Coles. On February 13, 1980, pursuant to F.R. Civ. P. 23(b)(2), Coles was recognized as the representative of a certified plaintiff class of "all black persons who may have been injured monetarily by the alleged racial steering practices of [Havens]on or since January 9, 1977," *Coles v. Havens Realty Corp.*, Civ. No. 79-0024 (E.D. Va., Feb. 17, 1981), *reprinted in* EQUAL OPP. HOUS. ¶ 18,031 (P-H). *See Turner v. A.B. Carter, Inc.*, 85 F.R.D. 360 (E.D. Va. 1980). The case was tried June 22 and 23, 1980, and the parties thereafter entered into a Consent Decree approved by the district court on February 17, 1981, which recites that

> The Court finds from the evidence presented in this case that the policies and acts of the defendants

> Havens Realty Corporation and Rose Jones violated the provisions of the Fair Housing Act of 1968 and the Civil Rights Act of 1866.

Coles v. Havens Realty Corp., supra, at 18,136. The consent decree permanently enjoined the petitioners from violating either statute and granted extensive additional injunctive relief for a period of three years, including recordkeeping of visitors to Havens' offices and applicants for apartments, posting of racial occupancy and vacancy information in its offices on a current basis for both apartment complexes, display of fair housing logos in the office, and use of the logos on all forms and in all advertisements. It awarded $2250 damages to Coles and established a $13,500 claim fund for class members, permitting H.O.M.E. to counsel prospective claimants against the fund. Finally, it required the payment of $17,500 in attorneys' fees by Havens. *Id.* at 18,136-38. The only matters not addressed explicitly in the consent decree are the claims of Coleman, Willis and H.O.M.E. for damages.

On July 1, 1981, the district court approved payment of various claims filed by class members against the $13,500 fund established by the consent decree. The court further directed that the case be "closed," subject to the terms of the permanent injunction which had issued as part of the decree.

SUMMARY OF ARGUMENT

The appeal below involved an order of dismissal as to some, but not all, of the plaintiffs in this case, pursuant to F.R. Civ. P. 54(b). After the Court of Appeals issued its decision, the remaining plaintiff (who had been certified as representative of a class) and the petitioners entered into a consent decree which appears to grant substantialy all of the relief sought in the complaint, and which includes language that may be interpreted as relinquishing the claims of the dismissed plaintiffs who had appealed. The Court should, therefore, dismiss the writ

as improvidently granted or remand this case for a determination as to possible mootness.

Alternatively, the Court should remand so that the issues can be further developed and narrowed with the result of limiting the number or scope of constitutional questions which this Court would be required to decide in this case. Because of the alternative holdings announced below, the issues cannot be narrowed absent such a remand.

ARGUMENT

I

In Light Of Events Which Have Occurred Subsequent To The Entry Of Judgment Below, This Court Should Not Reach The Merits Of This Case

As indicated in the brief Statement, *supra*, this case reaches the Court in a rather unusual posture. As a result of the F.R. Civ. P. 54(b) judgment permitting an appeal of the trial judge's standing and timeliness determinations as to respondents, those issues were litigated before the Fourth Circuit at the same time as the factual allegations of the complaint were made the subject of evidentiary proof and hearing.[1] Following the hearing, the remaining plaintiff (represented by the same counsel as respondents) and the petitioners stipulated to a finding of racial steering in violation of the Fair Housing Act of 1968 and the Civil Rights Act of 1866—and to the entry of a judgment awarding broad injunctive relief, damages to Coles and to the class of plaintiffs whom he represented, and attorneys' fees to plaintiffs' counsel.

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[1] Although it is not apparent from the record before this Court nor from the consent decree entered February 17, 1981, Coleman and Willis testified as H.O.M.E. employees on behalf of Coles at the June, 1980 trial. The consent decree makes specific provision for H.O.M.E. to counsel class members. *See Coles v. Havens Realty Corp.*, *supra* at 18,138.

In these circumstances, it simply is not clear what is left of this lawsuit, as it was originally framed in the complaint filed by respondents and Coles. On its face, the consent decree appears to provide substantially the relief sought in the case. To be sure, respondents had been dismissed as formal plaintiffs in the case at the time the consent decree was negotiated and approved, and their respective claims for damages from petitioner Havens were not addressed explicitly in that decree. However, the decree on its face does appear to resolve the claims of

> . . . *all plaintiffs*, including those that may hereafter be joined by the Court pursuant to the class certification of this action, *for all damages, costs, expenses*, and fees incurred in all negotiations and/or other activities *arising out of the Complaint filed herein.*

Coles v. Havens Realty Corp., *supra*, at 18,138 (emphasis supplied). The effect of this language has not yet been determined, but it is certainly conceivable that, either as a result of this provision of the decree or by virtue of the substantial relief awarded in the decree, the controversy between the parties is now moot.[2]

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[2] Neither petitioners (in their petition for certiorari or their brief on the merits) nor respondents (in their Brief in Opposition to Certiorari or in a subsequent filing) have yet advised the Court of the entry of the consent decree. Respondents may have felt bound to defend the judgment and opinion of the court below—or may wish to obtain a ruling from this Court because H.O.M.E.'s operations in the Richmond area continue. *See, e.g.*, EQUAL OPP. HOUS. ¶ 19,505 (P-H). Petitioners similarly may desire to have this Court's views on the reasoning of the court below. Of course, the parties may not stipulate a case to be within the jurisdiction of this Court. *See Minnick v. California Dep't of Corrections*, 49 U.S.L.W. 4609 (June 1, 1981); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Indiana Employment Security Div. v. Burney*, 409 U.S. 540 (1973); *Swift & Co. v. Hocking Valley R.R.*, 243 U.S. 281, 289 (1917); *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.*, 145 U.S. 300 (1892).

Petitioners have advanced serious constitutional claims, but that fact only underscores the urgency of determining whether or not this litigation has continuing vitality. For this Court has many times emphasized that it follows a " 'policy of strict necessity in disposing of constitutional issues,' *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 . . . ." *Minnick v. California Dep't of Corrections*, 49 U.S.L.W. 4609, 4613 (June 1, 1981).

The mootness determination can best be made by the district court, which is also in the best position to construe the terms of the consent decree. Further proceedings in the trial court, if the case is determined not to be moot, would have several additional advantages: (1) the trial court could reconsider its rulings as to the standing of the various respondents in light of this Court's subsequent decision in *Gladstone, Realtors v. Village of Bellwood, supra* [hereinafter cited as *"Bellwood"*].[3] (2) The ambiguities of the record, upon which petitioners focus significant attention (*see* Brief for Petitioners, at 26-27, 30-31), could be clarified by appropriate amendment of the complaint to delineate the exact location of Coleman's and Willis' residences, and the precise impact upon the surrounding neighborhoods of Havens' adjudicated racial steering practices, *see Bellwood, supra*, 441 U.S. at 112 n.25. (3) Similarly, uncertainties concerning the residential location of H.O.M.E.'s membership (*see* Brief for Petitioners, at 13-14) could be eliminated through amendment of the pleadings. (4) The question of the timeliness of the filing of this action could be redetermined by the district court with respect to the claims of Coleman and Willis as residents of the affected community (*see* pp. 12-14 *infra*), if the trial

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[3] The district judge apparently recognized that his ruling was open to question after *Bellwood*, for he sought a remand of this case from the Fourth Circuit in light of that decision. *See Turner v. A.B. Carter, Inc., supra*, 85 F.R.D. at 363 n.3.

court reaches a different result as to their standing in this capacity under *Bellwood, supra.*

For these reasons, and in light of the altered posture of this case, *amici* suggest that the writ of certiorari be dismissed as improvidently granted, which will have the effect of returning the matter to the district court. Alternatively, the Court may wish to vacate the judgment below and remand the case to the district court for consideration of possible mootness, *see, e.g., Johnson v. Board of Educ. of Chicago, supra; Indiana Employment Security Div. v. Burney, supra*; this disposition would remove any precedential weight from the ruling below, *see County of Los Angeles v. Davis, supra,* 440 U.S. at 634 n.6.

II

Alternatively, This Court Should Remand For Further Development And Narrowing Of The Issues

As we have previously remarked, the Court is presented with a multiplicity of issues relative to respondents' standing and the timeliness of this suit's commencement because of the alternative holdings by the Fourth Circuit. At the same time, as we show below, many of the issues are interrelated and their disposition in this case depends upon specific additional factual allegations or proof. *Amici* urge the Court to remand this case, rather than attempting to decide all of these questions, so as to allow reconsideration of the district court's rulings in light of *Bellwood, supra,* amendment of the pleadings, and narrowing of the issues. This disposition is likely to result in avoiding the necessity for this Court to decide at least some of the multiple questions presented in the current posture of this action.

All of the issues raised before the Court are interrelated with each other, and decision of some will make unnecessary disposition of the others. For example, if

Willis and Coleman have standing as residents of areas affected by the discriminatory steering practices of Havens,[4] there would be no need to address the timeliness issues, since in their capacity as residents of the "target area," [5] *see Bellwood, supra*, 441 U.S. at 112 n.25, they would have suffered injury when Coles was steered on July 13, 1978 [6]—and their complaint, filed 180 days later, would clearly have been timely. Similarly, if standing were sustained under § 1982, as the district court recognized there would be no problem regarding timeliness. On the other hand, if Willis and Coleman have standing as "testers," [7] then the timeliness questions must be de-

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[4] The district court held racial steering to violate both the 1968 Fair Housing Act and the Civil Rights Act of 1866, 42 U.S.C. § 1982. *Coles v. Havens Realty Corp., supra*, at 18,136. This holding was not disturbed by the Court of Appeals and petitioner has not contested that determination here. Hence, this Court need not pass upon the matter. *See Bellwood, supra*, 441 U.S. at 115 n.32. (The Court in that case did recognize the severe consequences which could follow steering on a major scale, *id.* at 109-11.)

[5] The complaint alleges that Coleman and Willis are "residents of the City of Richmond or Henrico County," which is certainly broad enough to encompass residence within the "target area." As this Court suggested in *Warth v. Seldin*, 422 U.S. 490, 501 (1975), if there was a need for "further particularized allegations of fact deemed supportive of plaintiff[s'] standing," the district court should have "require[d] the plaintiff[s] to supply [them], by amendment to the complaint or by affidavits," rather than dismissing.

[6] Steering "testers" does not affect their ability to reside in integrated communities nor deprive them of interracial associations since by definition "testers" are not seeking to relocate. But as residents of a "target area," "testers" would suffer injury whenever a *bona fide* minority applicant for purchase or lease of property is steered.

[7] *Amici* believe that the issue of "tester standing" involves a novel question as to which this Court's guidance would be of assistance to the lower courts, *see* Supreme Court Rule 17.1(c), and that there is strong support in the statute, the legislative

cided—but not whether the allegations of the complaint were sufficient to support their alternative claims of standing as residents of the area affected by Havens' steering who were denied the benefits of interracial associations by Havens' conduct. The questions of H.O.M.E.'s standing—either in a capacity as representative of its members or suing in its own organizational status—and the timeliness of its filing, are likewise intertwined.

This phenomenon is not unusual, and ordinarily it would not counsel a remand. Here, however, such a disposition is appropriate for several reasons. *First*, this Court has traditionally sought to avoid unnecessary decision of constitutional issues. *See Minnick v. California Dep't of Corrections*, *supra*, and cases cited therein. Developments on remand of this action may obviate the need for a decision of the constitutional questions raised. *Second*, as we have noted, petitioners' arguments concerning the standing of H.O.M.E. as representative of its

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history and the case law for recognizing "tester" standing to challenge racial steering practices. The question was briefed by the Lawyers' Committee in its *amicus* brief in *Bellwood*, *supra*, but not reached by the Court, *see id.*, 441 U.S. at 111. For the Court's convenience, we repeat those arguments in an appendix hereto. Our submission is, in short, that the racial steering to which respondents Coleman and Willis were subjected deprived them of specific rights guaranteed by the Fair Housing Act—and that invasion of those rights therefore constitutes the requisite personal injury supporting their standing to sue. *Warth v. Seldin*, *supra*, 422 U.S. at 514 (". . . Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute"); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). This was not the reasoning of the Court of Appeals, which viewed respondents as "bona fide surrogates" for the victims of discrimination and relied upon "strong public policy" considerations, *Coles v. Havens Realty Corp.*, 633 F.2d 384, 387 (4th Cir. 1980).

members and of Coleman and Willis as residents of the "target area" primarily involve the degree of specificity of the allegations of the complaint (*see* Brief for Petitioners at 11-17), a matter to which the court below was sensitive. The Fourth Circuit panel emphasized in its ruling that it was merely permitting respondents to proceed to trial, and that adequate proof to support the standing claims would have to be adduced; and it suggested that the district court require amendment of the complaint to provide greater specificity. *Coles v. Havens Realty Corp.*, *supra*, 633 F.2d at 391; see note 5 *supra*; *see also Bellwood*, *supra*, 441 U.S. at 112 n.25; *Sierra Club v. Morton*, 405 U.S. 727, 735 n.8 (1972). *Third*, the district court did not reject these alternative standing claims on the grounds now advanced by petitioners. Instead, the trial judge—acting in advance of this Court's ruling in *Bellwood*—held that respondents (who claimed that the racial stering practiced by Havens denied them the valuable benefits of interracial associations) "assert no more than the general public interest." Remanding the matter would therefore give the trial court an occasion to reconsider that ruling in light of *Bellwood*,[8] as well as to afford the opportunity for amendment of the complaint which the Court of Appeals contemplated. These developments could very well result in removing the need for further constitutional adjudication by this Court.

[8] *See* note 3 *supra*.

CONCLUSION

For the foregoing reasons, *amici* suggest respectfully that the writ of *certiorari* previously granted herein be dismissed as improvidently granted; that the judgment below be vacated and the case remanded to the district court to consider possible mootness, reconsider its rulings in light of *Bellwood*, and permit amendment of the complaint; or that the case be remanded for further development of the issues, to include such reconsideration and allowance of amendment.

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APPENDIX

APPENDIX

The Standing of "Testers" to Challenge Racial Steering Under the Fair Housing Act of 1968

The statute identifies expansively the discriminatory practices which it is intended to outlaw. 42 U.S.C. § 3604(a) makes it unlawful

> To refuse to sell or rent after the making of a bona fide offer, *or to refuse to negotiate* for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion or national origin.

(Emphasis supplied.) The italicized terms are very broad indeed. The "refusal to negotiate" language is independent of the limiting words, "after the making of a bona fide offer," [a] which appear in the first phrase. The statute confers on individuals the right to participate in negotiations for the sale or rental of property free from racial discrimination whether or not they have a *bona fide* intention to follow through with actual lease or purchase. The practice of racial steering constitutes a self-imposed limitation (on the ground of race or color) of a realtor's willingness to negotiate.[b]

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[a] At least one court has suggested that it is these words which have prompted decisions holding that "testers" have no standing. *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 898 n.4 (3d Cir. 1977).

[b] Racial steering practices uniformly have been held to be within the coverage of the Act, though generally on the theory that they are included within § 3604(a)'s catchall phrase, "otherwise make unavailable or deny." *E.g., United States v. Real Estate One, Inc.*, 433 F. Supp. 1140 (E.D. Mich. 1977); *Fair Housing Council v. Eastern Bergen County MLS*, 422 F. Supp. 1071 (D.N.J. 1976); *Zuch v. Hussey*, 394 F. Supp. 1028, 1047 (E.D. Mich. 1975), *aff'd and remanded*, 547 F.2d 1168 (6th Cir. 1977) (*per curiam*). *Cf. Moore v. Townsend*, 525 F.2d 482 (7th Cir. 1975).

The three phrases of § 3604(a) are in the disjunctive; each applies "*to any person*" but only the first is restricted by the language, "after the making of a bona fide offer." Thus, construing § 3604(a) broadly to effectuate the Congressional purpose "to provide, within constitutional limitations, for fair housing throughout the United States," 42 U.S.C. § 3601; *see Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), the ban on racial steering extends to "testers" and other individuals who may not, at any given moment, be planning to make *bona fide* offers for the purchase or lease of particular property.

This reading of the statutory language is confirmed by the legislative history. Title VIII of the 1968 Civil Rights Act did not appear in the original House of Representatives version. It was added by an amendment on the Senate floor introduced by Senator Dirksen. 114 Cong. Rec. 4570 (February 28, 1968). However, § 204(a) in Senator Dirksen's amendment omitted the language in question and would have made it a discriminatory practice

> To refuse to sell or rent, to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

114 Cong. Rec. 4571 (February 28, 1968). The words "after the making of a bona fide offer or" were added subsequently, as the result of an amendment suggested by Senator Allott and accepted by the bill's Floor Manager, Senator Mondale. 114 Cong. Rec. 5515-16 (March 6, 1968).

When his amendment was brought up for discussion (cloture having been invoked on the bill), Senator Allott was very specific about its reach and effect. He stated that it

> . . . applies to sale or rental—the first four words only of line 7.
>
> It will be noted that the latter part of paragraph (a) is not conditioned upon a bona fide offer, because the amendment as offered concludes with the word "or" rather than "and."

114 Cong. Rec. 5515 (Mar. 6, 1968). On this basis, the amendment was accepted by Senator Mondale and incorporated into the bill. *Id.* at 5516-17.[c]

In addition, 42 U.S.C. § 3604(b) prohibits discrimination because of race or color

> against any person *in the terms, conditions* of sale or rental of a dwelling, or *in the provision of services or facilities in connection therewith* . . .

(emphasis supplied). Just as requiring more onerous application procedures for blacks can be viewed as discrimination in the terms or conditions of sale or rental, *cf. United States v. Youritan Constr. Co.*, 370 F. Supp. 643, 648 (N.D. Cal. 1973), *modified as to relief and aff'd*, 509 F.2d 623 (9th Cir. 1975) (holding such conduct to be within "otherwise make unavailable or deny" language of § 3604(a)), so may racial steering practices be interpreted to be within the prohibitions of this subsection, which bars these prohibited practices from being applied to "any person." *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F. Supp. 486, 488 (E.D.N.Y. 1977).

Finally, § 3604(d) makes it illegal

> To represent to any person because of race, color, religion, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

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[c] There was no discussion of this language in the House, which passed the Senate version of the bill without change.

Racial steering constitutes an implicit, and sometimes a verbal, representation about the availability of housing. Hence it can be considered within the reach of this subsection. *Compare United States v. Hunter*, 459 F.2d 205, 215 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972) (implicitly discriminatory advertising; § 3604(c)); *United States v. Real Estate One, Inc., supra* n.b. (racial steering effect of assignment of black and white employees by realty firm).

Thus, we submit, the Fair Housing Act creates substantive rights of nondiscriminatory access to information and related housing market services in favor of *any person*, not just persons who make "bona fide offers" to purchase or lease property. These rights are precisely analogous to the "right to occupy certain public accommodations or conveyances" which petitioners concede was the basis for recognition of "tester" standing in *Pierson v. Ray*, 386 U.S. 547 (1967) and *Evers v. Dwyer*, 358 U.S. 202 (1958). *See* Brief for Petitioners at 23-24.[d]

Lower federal courts, while differing as to the applicable statutory subsection, have followed this general analysis, with the result of construing the Act to protect "testers," as well as "bona fide purchasers," from racial steering. *Grant v. Smith*, 574 F.2d 252, 255 (5th Cir. 1978) (*per curiam*); *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co., supra. See also Northside Realty Associates, Inc. v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979); *Meyers v. Pennypack Woods Home Ownership Ass'n, supra* n.5, 559 F.2d at 898; *Smith v. YMCA of Montgomery*, 462 F.2d 634, 645-46 (5th Cir. 1972).

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[d] Thus, the fact that an individual's motivation for visiting a realty office was to conduct a "test" is irrelevant to his or her standing to redress deprivations of rights guaranteed by the Fair Housing Act. *See Evers v. Dwyer, supra*, 358 U.S. at 204.

Both Coleman and Willis sought to obtain accurate information about apartment availability by visiting the Havens Realty offices. Both were subjected to the demeaning experience of having Havens' employees' responses to their inquiries vary according to their racial identities. Each was, therefore, denied rights guaranteed by the Fair Housing Act of 1968 and had standing to sue for redress.

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No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HAVENS REALTY CORPORATION and ROSE JONES,

Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and HOUSING OPPORTUNITIES MADE EQUAL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES AS AMICUS CURIAE

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I.	
HOME Has Standing To Sue Under The Fair Housing Act For Its Own Injury	6
II.	
HOME Has Standing To Sue As A Representative Of Its Members	11
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

Associated General Contractors of North Dakota v. Otter Tail Power Company, 611 F.2d 684 (8th Cir. 1979) 18

Boyce v. Rizzo, 78 F.R.D. 698 (E.D. Pa. 1978) 15

Chicago Midwest Meat Association v. City of Evanston, 589 F.2d 278 (7th Cir. 1978) 17

Coalition for Block Grant Compliance v. HUD, 450 F. Supp. 43 (E.D. Mich. 1979) 11

Coles v. Havens Realty Corporation, 633 F.2d 384 (4th Cir. 1980) 6, 9, 15, 18

Consumers Union of the United States, Inc. v. Miller, 84 F.R.D. 240 (D.D.C. 1979) 16, 19

Expert Electric Company v. Levine, 554 F.2d 1227 (2d Cir. 1977) 17
Fair Housing Council of Bergen County v. Eastern Bergen County Multiple Listing Service, 422 F. Supp. 1071 (D.N.J. 1976) 11, 14, 16
Gladstone Realtors v. Village of Bellwood, 441 U.S. 91 (1971) 3, 4, 10, 13, 14
Health Research Group v. Kennedy, 82 F.R.D. 21 (D.D.C. 1979) 13, 15
Heights Community Congress v. Rosenblatt Realty, 73 F.R.D. 1 (N.D. Ohio 1975) 11, 17
Huertas v. East River Housing Corporation, 81 F.R.D. 641 (S.D.N.Y. 1979) 15, 16
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977) ..... 5, 12, 13, ... 15, 16, 17, 18, 19
National Constructors Association v. National Electric Contractors Association, 498 F. Supp. 510 (D. Md. 1980) 18
Park View Heights v. City of Black Jack, 467 F.2d 1208 (8th Cir. 1972) and 605 F.2d 1033 (8th Cir. 1979) 10
Rochambeau v. Brent Exploration, Inc., 79 F.R.D. 381 (D. Col. 1978) 14
Sierra Club v. Mason, 351 F. Supp. 419 (D. Conn. 1972) 19
Sierra Club v. Morton, 405 U.S. 727 (1972) 8, 14
Southern Pacific Railroad v. United States, 168 U.S. 1 (1897) 17
Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 205 (1972) 3, 10
United States v. Henshaw Brothers, Inc., 401 F. Supp. 399 (E.D. Va. 1974) 11
Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977) 3, 9, 11

Village of Bellwood v. Gladstone Realtors, 569 F. 2d 1013 (7th Cir. 1978) 4, 13
Village of Park Forest v. Fairfax Realty Company, P.H.E.O.H. Rptr. ¶13,699 (N.D. Ill. 1975) .. 11
Warth v. Seldin, 422 U.S. 490 (1975) ..... 8, 11, ... 12, 13, 14, 16
Wheatley Heights Neighborhood Coalition v. Jenna Resales Company, 429 F. Supp. 486 (E.D.N.Y. 1977) 14
Williamsburg Fair Housing v. New York City Housing Authority, 450 F. Supp. 602 (S.D. N.Y. 1978) 11
Zuch v. Hussey, 366 F. Supp. 553 (E.D. Mich. 1973) and 394 F. Supp. 1028 (E.D. Mich. 1975), *aff'd.*, 547 F.2d 1168 (6th Cir. 1976) 10, 11

Constitutional Provisions And Statutes

United States Constitution, Article III 10
Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.* ..... *passim*

In The

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On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE LEADERSHIP COUNCIL FOR METROPOLITAN OPEN COMMUNITIES AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

With the consent of the parties, the Leadership Council for Metropolitan Open Communities submits this brief as *amicus curiae* in support of the respondents, urging affirmance of the judgment of the United States Court of Appeals for the Fourth Circuit.

The Leadership Council for Metropolitan Open Communities (hereafter "Leadership Council") is a not-for-profit corporation organized in 1966 under the laws of the State of Illinois. Its board of directors consists of leaders of business, labor, government, religion, civil rights and housing.*

* Thomas G. Ayers, Chairman, Executive Committee, Commonwealth Edison Company; Edwin C. Berry, Assistant to the President, Johnson Products Co., Inc.; Frederick G. Jaicks, Chairman, Inland Steel Company; Marshall B. Front, Partner, Stein, Roe & Farnham; James J. O'Connor, Chairman, Commonwealth Edison Company; James O. Webb, Senior Vice President, Blue Cross Blue Shield; James W. Compton, President, Chicago Urban League; E. Stanley Enlund, Chairman, First Federal Savings & Loan Association; Warren H. Bacon, Assistant Director, Manpower Administration, Inland Steel Company; Patricia Banks, Attorney; Edward Billingsley, Edward Billingsley & Associates; Jorge H. Boada; James J. Brice, Co-Chairman, Arthur Andersen & Company; Allison S. Davis, Davis, Miner & Barnhill; Irving M. Gerick, Vice President, BA Mortgage and International Realty Corporation; Robert H. Gerstein, Partner, Holleb & Goff; Stanford L. Glass, Partner, Holleb & Goff; Ronald V. Greer, Vice President, Continental Illinois Bank; Elwin J. Griffith, Dean, DePaul College of Law; Hon. Virginia M. Hayter, President, Hoffman Estates; Ben W. Heineman, President, Northwest Industries; Kenneth M. Henderson, Executive Director, Chicago United; Peter M. Husting, Management Director, Leo Burnett Company; Daniel E. Levin, Partner, McHugh-Levin Associates; Rev. William J. Lion, Executive Director, Illinois Catholic Conference; Marion W. Maner, President, Century 21-Maner Realty; Gwendolyn R. Martin, Administrative Assistant, Communications Workers of America; Rabbi Robert J. Marx, Congregation Solel; James J. McClure, Gardner, Carton & Douglas; Hon. Dawn C. Netsch, Senator, State of Illinois; Richard B. Ogilvie, Isham, Lincoln & Beale; Roger L. Plummer, Vice President, Residence, Illinois Bell Telephone Company; Rt. Rev. Quintin E. Primo, Suffragan Bishop, Episcopal Diocese of Chicago; Muriel F. Smith; Dr. Charles Spivey, Pastor, Coppin AME Church; James B. Strenski, Chairman, Public Communications, Inc.; Charlie Thurston, Division Vice President, Northern Illinois Gas; Robert L. Tucker, Tucker & Watson; Betty Wilhoite, President, League of Women Voters of Chicago; James L. Wright, Director, Region Four, United Auto Workers.

Its principal goal is the creation of a single, nondiscriminatory housing market in the Chicago metropolitan area.* A substantial part of its efforts to this end is the Legal Action Program, which since 1969 has provided legal counsel on behalf of minority homeseekers, community fair housing organizations, municipalities and others seeking open housing under the law, in cases under the Fair Housing Act of 1968, the Civil Rights Act of 1866 and Constitutional provisions.

In obtaining relief for over 600 such plaintiffs, the Legal Action Program of the Leadership Council has dealt with cases which have clarified fair housing laws. *See Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977). The Leadership Council has often been called upon to assist others in their efforts to eliminate housing discrimination outside the Chicago metropolitan area. Housing discrimination is a nationwide problem and the Leadership Council has particular expertise in this area of the law.** On the basis of this extensive experience in Chicago and throughout the nation, the Leadership Council believes that community fair housing organizations have a significant role to play in enforcement of fair housing laws as "private attorneys general," *see Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211 (1972). It may be necessary in certain circumstances for such organizations to file suit on their own behalf and on behalf of their members to obtain full enforcement and to achieve the purposes of the fair housing laws.

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* The Chicago metropolitan area for this purpose includes six counties in Illinois, Cook, DuPage, Lake, Will, McHenry and Kane, and two in Indiana, Lake and Porter.

** The Leadership Council has since 1971 published the Guide to Practice Open Housing Law, a lawyer's guide to fair housing cases, now in its third edition.

It is the view of the Leadership Council that the decision of the Fourth Circuit correctly resolved several issues which are vital to the continued enforcement of the fair housing laws by organizations like Housing Opportunities Made Equal (HOME), which is similar to many of the client organizations who have been assisted by the Leadership Council. The purpose of the Leadership Council's participation as *amicus* is to urge affirmance of the decision of the Fourth Circuit, and in particular to support and augment the position of the respondents on the issues of HOME's standing to sue both for its own injury and as a representative of its members.

The petitioners' reliance on the narrow ruling with respect to the Leadership Council's standing by the Seventh Circuit in *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013 (7th Cir. 1978), is misplaced.* (Brief for Petitioners p. 21.) In *Bellwood* the Leadership Council alleged only that it is a not-for-profit organization with a desire to further open housing. It did not allege the full range and scope of its program nor did it rely on any contracts or arrangements with governmental agencies. The Seventh Circuit did not review all the elements of standing here being considered. Although the *Bellwood* case may be distinguished on the facts,** such an inquiry is not necessary because of the difference between the Leadership Council and HOME in terms of their structure and functions. The Leadership Council

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* The issue of the Leadership Council's standing was not raised on certiorari to this Court. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 98 n.5 (1979).

** For example, the individual plaintiffs in this case are HOME employees, while in *Bellwood* none of the plaintiffs alleging injury had any connection with the Leadership Council. The individual plaintiffs in *Bellwood* who had standing were not members of the Leadership Council. Similar persons are members of HOME and just as they have standing on their own, they thereby confer standing on the HOME organization.

is not itself a community-based fair housing organization, but it provides legal representation to many organizational clients who are the same as HOME. The Leadership Council supports the position that HOME fully meets the requisites of standing.

SUMMARY OF ARGUMENT

The Court of Appeals for the Fourth Circuit correctly held that HOME has standing to sue under the Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.*, for its own injury incurred as the result of the petitioners' racial steering practices. HOME's counseling, referral and informational housing services performed under contract with the City of Richmond make HOME's activities an extension of the City's services to the Richmond community, and the petitioners' conduct has frustrated the effectiveness of those services. The distinct and palpable injury to HOME's ability to carry out its programs in pursuit of the Congressionally mandated goal of equal access to housing, the impairment of HOME's performance of its contractual duties, and the direct loss of resources expended to identify and counteract the petitioners' discriminatory practices, are injuries for which HOME has standing to seek redress under the Fair Housing Act.

HOME also has standing to sue as the representative of its members. In *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), the Court developed a three-part test to determine whether an association has standing as the representative of its members. First, the members of the organization must have standing. Petitioners' actions have deprived HOME's members of the benefits of living in a stable, integrated society. Second, the interests which the organization seeks to assert must be

germane to its purpose. The purpose of HOME is to eliminate racial discrimination in housing in the Richmond area, which is the same as the interests of its members in this suit. Third, neither the claim asserted nor the relief requested requires the participation of individual members. The claim of each member arises from the same set of facts. The injunctive relief requested by HOME does not require any individual determination of fact. The suit by HOME will expeditiously resolve the claims of all of its members in a single action and protect petitioners from a multiplicity of suits.

ARGUMENT

I.

HOME HAS STANDING TO SUE UNDER THE FAIR HOUSING ACT FOR ITS OWN INJURY.

Respondent HOME is a not-for-profit corporation which was organized to effectuate the purposes of the Fair Housing Act of 1968 and other fair housing laws. Its members number approximately 600 in the Richmond, Virginia metropolitan area. Its activities include researching and investigating conditions in the Richmond housing market, counseling homeseekers with respect to available housing, preparing pamphlets regarding housing availability in the Richmond area, counseling persons who have been discriminated against and designing and carrying out fair housing programs including legal and administrative action. Its work is funded by private donations, fees and contracts with governmental agencies. *Coles v. Havens Realty Corporation*, 633 F.2d 384, 385 (4th Cir. 1980).

HOME has entered into a series of contracts with the City of Richmond to provide fair housing services to the City. These contracts, dating back to 1974, provide for

payment of some $400,000 to HOME for such services.* Some of this work has been completed and other work under the contracts is being done on a continuing basis. Many of the activities of HOME under the agreements with the City would have to be done by City staff if HOME's services were not available.

The City of Richmond has selected HOME to do this work because of its experience in fair housing and because it has a trained staff and community support for its programs. In order to duplicate the expertise of HOME, the City would be required to expend large sums of money and use costly municipal facilities without any recognizable return for such additional expense. HOME can provide these housing services less expensively and more professionally.

Moreover, by using HOME the City leverages each dollar because HOME is engaged in additional activities funded by sources other than the City of Richmond. The City receives residual benefits from HOME's other programs, which supplement and make more effective the work done for the City. For example, among other things HOME investigates the real estate market in the Richmond area on a continuing basis to determine if discrimination is taking place and to identify the form of any such discrimination. The contracts with the City require HOME to obtain certain specific information, but the facts otherwise obtained by HOME and not paid for by the City help make the City's information more useful.

HOME has standing to bring this action because of its unique position with the City of Richmond as an exten-

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* HOME was precluded from presenting evidence on these particulars by the early dismissal, but they are contained in the public record. See Richmond City Council Ordinance No. 77-58-69.

sion of the municipality. It is unlikely that anyone would question a suit by the City based on the same or similar facts if members of the staff of the City were thwarted in their fair housing efforts. HOME acts for the City, carrying out the dictates of the City in order to help them meet the requirements of federal laws and regulations. Actions to stop discriminatory practices are a logical extension of the duties prescribed by the contracts with the City of Richmond.

In addition, HOME has standing based on its activities apart from what it does under agreements with the City. Unlike some private special interest groups that develop their own goals and agendas, HOME has as its purpose carrying out goals established by the Congress of the United States, the legislature of the State of Virginia, and the City of Richmond. There is no infirmity like that attributed to private groups who are following their own dictates.*

An organization such as HOME has standing to seek redress for the distinct and palpable injury caused by the petitioners' racial steering practices.** They may seek relief without the burden of delineating specific pecuniary loss when there has been interference with

* In *Sierra Club v. Morton*, 405 U.S. 727 (1972), this Court held that organizations or individuals seeking standing must allege facts showing that they have "a direct stake in the outcome" of the action. 405 U.S. at 740. HOME clearly meets that test. Unlike the plaintiff in *Sierra Club v. Morton*, HOME has suffered direct harm to the effectiveness of existing programs and activities, some conducted under contract with the City of Richmond and all designed to achieve the enforcement of Congressionally mandated fair housing objectives. These services clearly distinguish HOME from organizations which "seek to do no more than vindicate their own value preferences," *Id.*

** This Court has held that "distinct and palpable injury" is the standard for an organizational plaintiff seeking to sue for its own injury. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). An organization may sue "to vindicate whatever rights and immunities the association may enjoy." *Id.*

concrete efforts furthering the goals of the fair housing laws. Here respondents seek to make housing available which would otherwise be unavailable because of discrimination. *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 263 (1977). The petitioners' racial steering practices harm HOME in that the organization's functional efforts to assist equal access to housing through counseling and referral services were frustrated, causing HOME to expend still further resources to identify and counteract the petitioners' discriminatory practices.

As the Court of Appeals for the Fourth Circuit correctly held, conduct of a defendant which frustrates housing services such as those of HOME confers standing on the organization to sue under the Fair Housing Act of 1968, 42 U.S.C. §3601 *et seq.* The same kind of injury was held to confer standing on the plaintiff in *Village of Arlington Heights v. Metropolitan Housing Development Corporation, supra.* As the Court of Appeals said:

> Although HOME's goals cannot be equated with brick and mortar, they are functional, requiring identifiable action and the expenditure of effort and funds which may result in success or failure in achieving its objectives. Its "projects" therefore provides [sic] that "essential dimension of specificity" that informs judicial decision making, as described in *Arlington Heights.*

Coles v. Havens Realty Corporation, 633 F.2d 384, 391 (4th Cir. 1980).

In addition, the fact that HOME has devoted resources both to its contractual fair housing projects and its efforts to counteract the petitioners' discriminatory practices is the very kind of direct harm for which an aggrieved party has standing to seek redress. Together with the harmful effect of the petitioners' conduct on the effectiveness of HOME's services, expenditures of resources are losses which may be recovered by HOME under the Fair Housing Act.

HOME's Standing Is Particularly Important To Vindicate A Congressional Policy

It is particularly important that HOME's standing be upheld in light of the particularly pernicious nature of racial steering, which is widespread and extremely difficult to detect and prove. Standing under the Fair Housing Act is as broad as is permitted under Article III. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). In *Trafficante* this Court pointed out that the "main generating force" for enforcing the Act "must be private suits in which . . . the complainants act not only in their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority." 409 U.S. at 211. *See also Gladstone Realtors v. Village of Bellwood*, 411 U.S. 91, 109 (1979).

Organizational standing is especially important with respect to racial steering, where the individuals most directly aggrieved are, for various reasons, in a poor position to assert their claims in court. A black person who is shown home listings in particular neighborhoods (often predominantly white areas which have only recently been targeted for racial transition by area realtors) has no way of knowing what listings are being made available to whites and can therefore seldom compare his experiences with those of his white counterpart to detect discrimination. Likewise, the white resident who flees an area disrupted by steering often loses interest in that community and as a result may be disinclined to join in efforts to stop the practice of steering.

Accordingly, most of the cases involving racial steering have of necessity been brought either by the United States, municipalities or organizations. *See, e.g., Park View Heights v. City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972) and 605 F.2d 1033 (8th Cir. 1979); *Zuch v. Hussey*, 366 F. Supp. 553 (E.D. Mich. 1973) and 394 F.

Supp. 1028 (E.D. Mich. 1975) *aff'd.*, 547 F.2d 1168 (6th Cir. 1976); *Heights Community Congress v. Rosenblatt Realty*, 73 F.R.D. 1 (N.D. Ohio 1975); *Village of Park Forest v. Fairfax Realty Co.*, P.H.E.O.H. Rptr. ¶13,699 (N.D. Ill. 1975); *United States v. Henshaw Brothers, Inc.*, 401 F. Supp. 399 (E.D. Va. 1974); *Fair Housing Council of Bergen County v. Eastern Bergen County Multiple Listing Service*, 422 F. Supp. 1071 (D.N.J. 1976); *Williamsburg Fair Housing v. New York City Housing Authority*, 450 F. Supp. 602 (S.D.N.Y. 1978); *Coalition For Block Grant Compliance v. HUD*, 450 F. Supp. 43 (E.D. Mich. 1979); *Village of Arlington Heights v. Metropolitan Housing Development Corporation, supra.*

A new limitation on standing of homeseekers who are able to learn that they have been "steered" and who have both the will and the resources to sue would hamper efforts to deal with the pervasive problem of racial steering. This problem is even more difficult when, as here, the steering practices involve rental apartment units. In order for the respondents to vindicate rights under the Fair Housing Act, and eliminate racial steering with respect to rental residential property in Henrico County, Virginia, HOME must be accorded standing.

II.

HOME HAS STANDING TO SUE AS A REPRESENTATIVE OF ITS MEMBERS.

HOME is also challenging petitioners' unlawful practices on behalf of its members. The Fourth Circuit Court of Appeals held that HOME had standing to challenge the unlawful practices of the petitioners as the representative of its membership.

HOME falls within the basic rule for representational standing set down in *Warth v. Seldin*, 422 U.S. 490

(1975) and elaborated upon in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977). In *Warth*, individual and organizational plaintiffs from the Rochester, New York area claimed that a zoning ordinance passed by the town of Penfield excluded persons of low and moderate income from living in the town. The Court stated:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members . . . The possibility of such representational standing, however, does not eliminate or attenuate the constitutional requirement of a case or controversy . . . The association must allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit . . . So long as this can be established and so long as the nature of the claim and of the relief sought does not make individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

422 U.S. at 511. In *Hunt*, an association of Washington applegrowers created by the state sought to declare unconstitutional a North Carolina statute which had the effect of damaging the Washington applegrowers' North Carolina market. The Court established a three-part test for representational standing:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

432 U.S. at 343.

The application of the *Hunt* and *Warth* holdings to the present case clearly demonstrates that HOME has standing to pursue its members' claims.

Paragraph 16 of respondents' Complaint states:

> HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices in violation of the Fair Housing Act of 1968 . . . (App. 17-18)

This allegation satisfies the first part of the *Hunt* test. In plain terms HOME's standing is based on the injury caused by the petitioners' unlawful practices. The petitioners' attack on the pleading is apparently based in part on their objection to the allegations that interracial contacts have been affected by petitioners' actions. No greater degree of particularity is required in these pleadings. The respondents do state that petitioners' practices have deprived HOME members of certain benefits incident to living in an integrated community. HOME members live in areas where the racial balance has been adversely affected by petitioners' discriminatory practices. In *Gladstone v. Bellwood*, 441 U.S. 91 (1979), standing was conferred on individuals with a claim nearly identical to the one made by HOME's members.*

Petitioners also mistakenly assert that there is no causal connection alleged between injury to HOME members

* In that case, the Leadership Council did not assert representational standing, although the Court of Appeals noted that such an assertion, in a proper case, would confer standing. *Village of Bellwood v. Gladstone Realtors*, 569 F.2d 1013, 1017 (7th Cir. 1978); *see also Health Research Group v. Kennedy*, 82 F.R.D. 21, 26 (D.D.C. 1979).

and petitioners' unlawful acts. Respondents complain of petitioners' discriminatory practices which contribute to segregated housing patterns and inhibit the development of stable integrated communities. This allegation supplies the direct causal connection needed.

Furthermore, petitioners exaggerate the role of pleadings in determining standing.* Just as plaintiffs are not required to plead minute facts to support the elements of a cause of action, they need not plead all of the details with respect to standing. To place such emphasis on the complaint would exalt form over substance. When a defendant challenges a plaintiff's standing, affidavits to supply particularized facts may be filed. *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.*, 429 F. Supp. 486, 489 n.2 (E.D.N.Y. 1977); *see also Warth v. Seldin*, 422 U.S. at 501-502 (1975). Alternatively, an amendment to the complaint can be provided. Pleadings are not an end in themselves but merely a means to a just resolution of a dispute. *Rochambeau v. Brent Exploration, Inc.*, 79 F.R.D. 381, 386 (D. Colo. 1978). *See also Sierra Club v. Morton*, 405 U.S. 727, 735-36 n.8 (1972).

In *Gladstone v. Bellwood*, individuals deprived of the social and professional benefits of living in an integrated society alleged injury sufficient to confer standing. The individual plaintiffs in *Bellwood* alleged they resided in communities affected by defendants' unlawful practices. 441 U.S. at 111-115. The same is true for the members of HOME.

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* In *Fair Housing Council of Eastern Bergen County v. Eastern Bergen County Multiple Listing Service*, 422 F. Supp. 1071, 1074 n.2 (D.N.J. 1976), the court relegated to a footnote the observation that plaintiffs did not specify how many members of the Council resided in Bergen County. This fact was not an obstacle to standing.

The second part of the *Hunt* test inquires into whether the interests which the organization seeks to protect are germane to its purposes. Clearly HOME meets this requirement. The purpose of the second part of the test is to assess the interest asserted to determine if it is one that the claimant can properly assert as a true representative. *Boyce v. Rizzo*, 78 F.R.D. 698, 704 (E.D. Pa. 1978); *see also Health Research Group*, 82 F.R.D. at 28. The stated purpose of HOME is to eliminate discrimination in the housing market of Richmond, Virginia. In order to accomplish that purpose it operates a housing counseling service for people of all races, investigates charges of housing discrimination referring complaints to appropriate authorities, and operates a fair housing program designed to eliminate discriminatory housing practices. *Coles*, 633 F.2d at 385.

Petitioners apparently argue that because HOME has an interest in fair housing generally, its interests are not sufficiently parochial to represent the more personal interests of its members in this suit. The contention is totally without merit. While many of HOME's activities benefit non-members, its members who are residents of the Richmond area count on the organization to protect their rights. The success of the organization depends on the financial and program support of its members. The members' rights are of vital concern to HOME. Their interests, which HOME seeks to protect in this litigation, are clearly germane to its purposes.

In *Huertas v. East River Housing Corp.*, 81 F.R.D. 641 (S.D.N.Y. 1979), two organizations created for the purpose of securing housing for people of low and moderate income were granted standing. Noting the purposes of these organizations, the Court stated:

> These organizations, then, have even a more direct relation to the type of violation alleged here than would a general purpose civil rights group.

Id. at 649.

Standing is not weakened because the organization's activities are of general benefit to the community and not just to its members. In *Consumers Union of United States, Inc. v. Miller*, 84 F.R.D. 240 (D.D.C. 1979), the members of the Union represented only a portion of those interested in having a Federal Reserve System regulation held void. Nevertheless, the Court granted the Union standing. *Miller*, 84 F.R.D. at 244.

In the *Fair Housing Council* case, *supra*, a non-profit membership association dedicated to the promotion of equal opportunity in housing had standing to seek to stop those who contributed to segregated housing patterns:

> The Fair Housing Council may, however, establish standing as the representative of those of its members who have been injured in fact. The determination required is whether or not the interests of the individual plaintiffs to be free from discriminatory housing practices is sufficiently close to the interests of the Fair Housing Council to give the latter standing. In this case the interests of the organization and the individual plaintiffs are not only sufficiently close, they coincide. Both seek to be free from discriminatory practices by multiple listing services and real estate brokers. Therefore, the Fair Housing Council has standing to sue to assert the rights of the individual plaintiffs who in their own right have standing to sue.

Fair Housing Council, 422 F. Supp. at 1083.

The third element of the *Hunt* test is an inquiry into whether the organization can obtain a fair resolution of the controversy or if the determination requires participation of the association's individual members. Whether this component of the test is satisfied depends in substantial measure on the nature of the relief sought, and whether this relief, if granted, will inure to the benefit of the injured members. *See Warth*, 422 U.S. at 515, and *Huertas*, 81 F.R.D. at 649. HOME has requested

only injunctive relief for its members. There is no need to make any individualized determination of damages or injunctive relief. The harm suffered is common to all injured HOME members, and the remedy requested can reasonably be expected to benefit these individuals. Such a community organization has standing to represent those deprived of the benefits of living in an integrated society by defendants' conduct. *See Heights Community Congress v. Rosenblatt Realty Co.*, 73 F.R.D. 1 (N.D. Ohio 1975).

Petitioners raise a question with respect to the *res judicata* effect of a judgment in this case. *Res judicata* will bar a subsequent suit as to the issues raised here. Identity of issues is present when questions litigated and resolved in the prior proceeding are raised again in a subsequent proceeding. *Southern Pacific Railroad v. United States*, 168 U.S. 1, 48-49 (1897). Identity of parties is determined by due process considerations. It is not necessary that one must have been a party to both proceedings for *res judicata* to be invoked. The test is whether the interests of the party sought to be bound were adequately represented by another vested with authority of representation. *Expert Electric Company v. Levine*, 554 F.2d 1227, 1233 (2d Cir. 1977). *See also Chicago Midwest Meat Association v. City of Evanston*, 589 F.2d 278, 281 n.3 (7th Cir. 1978).

Where an association is a fair representative of its members, the members are bound by any judgment obtained by the association. The second and third components of the *Hunt* test are directed toward this inquiry. Since HOME clearly meets the *Hunt* test, its members will be bound by any judgment in this case. This will protect the petitioners from multiple suits arising from the same facts. It will assist the members in asserting their rights, just as a class action would, by allowing them to share the burden of litigation and

affording them a better opportunity to obtain effective results.

The petitioner proposes that another facet of the third element of the *Hunt* test is whether the interests of the association's members are too diverse to be represented by the association. Notwithstanding the dubious applicability of petitioners' argument,* there is no significant diversity of interest among HOME members. By joining HOME, members have expressed their desire to live in an open and integrated community. Petitioners have contributed to the deprivation of these benefits by their racially discriminatory practices. The members of HOME have banded together to obtain more than an order commanding petitioners to comply with the law. They want the violators to institute affirmative marketing practices to rectify the disruption of the community's racial balance caused by petitioners. *See Coles*, 633 F.2d at 385.

Petitioners claim that those non-members of HOME who were directly discriminated against will not be bound by any judgment obtained by HOME. Therefore, they argue, judicial economy will not be promoted and thus associational standing should not be granted. In the

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* In support of this proposition petitioners cite *Associated General Contractors of North Dakota v. Otter Tail Power Company*, 611 F.2d 684 (8th Cir. 1979) and *National Constructors Association v. National Electric Contractors Association*, 498 F. Supp. 510 (D.Md. 1980) (Brief for Petitioner, p. 15). However, the court in *National Constructors Association* rejected the proposition that mere diversity of interests among members precludes representational standing. In commenting on this, the court stated:

> The plain language of *Hunt's* third prong does not warrant such a holding. To the extent Associated General Contractors implies a different result, this court is not inclined to follow the Eighth Circuit's lead . . .

National Constructors Association, 498 F. Supp. at 521-22.

context of this case, petitioners' argument is totally without meaning. All those conceivably entitled to relief are before the Court and will be bound by any decision. If another direct victim of petitioners' discriminatory actions would seek relief, this victim could not, of course, rely on the evidence in this case but must present evidence showing he or she received discriminatory treatment. This direct victim would not be bound by any judgment obtained by HOME because there would be no identity of issues. Moreover, an organization need not represent all injured parties in order to have standing. Many cases have granted associations representational standing where the defendant's acts affected non-members of the association. *E.g., Sierra Club v. Mason*, 351 F. Supp. 419 (D. Conn. 1972) and *Consumers Union of United States v. Miller*, 84 F.R.D. 240 (D.D.C. 1979).

By a simple application of the test for representational standing set out in *Hunt*, it is clear that HOME has standing to sue as the representative of its members. This would protect the members' rights by allowing them to consolidate their identical claims and would protect the petitioners from multiple suits.

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the decision of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION and ROSE JONES,

Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and HOUSING OPPORTUNITIES MADE EQUAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE NATIONAL ASSOCIATION OF REALTORS® 2

I. The Identity Of NAR 2

II. The Total Commitment Of NAR To Fair And Equal Housing Opportunity .. 4

III. Purpose Of This Brief Amicus Curiae ... 5

SUMMARY OF ARGUMENT 8

ARGUMENT

I. Testers Do Not Have Standing Under Article III Of The Constitution 10

II. The Individual Plaintiffs Have Not Alleged A Nexus Between Defendants' Conduct And A Denial Of Plaintiffs' Right To Live In An Integrated Society 15

III. The Organizational Plaintiff Lacks Standing Under Article III Of The Constitution 19

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) 10
Village of Bellwood v. Dwayne Realty, 482 F.Supp. 1321 (N.D. Ill. 1979) 7
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 10
Evers v. Dwyer, 358 U.S. 202 (1958) 13
Flast v. Cohen, 392 U.S. 83 (1968) 12
Gladstone, Realtors® v. Village of Bellwood, 441 U.S. 91 (1979) 8, 9, 10, 14, 18
Hunt v. Washington Apple Advertising Commission, 432 U.S. 333 (1977) 19, 20
Jones v. Mayer Co., 392 U.S. 409 (1968) 4
Linda R. S. v. Richard D., 410 U.S. 614 (1973) 10
Pierson v. Ray, 386 U.S. 547 (1967) 13
Schlesinger v. Reservists to Stop the War, 418 U.S. 208 (1974) 12
Sierra Club v. Morton, 405 U.S. 727 (1972) ... 12, 22, 23
Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976) 10, 12
Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205 (1972) 8, 9, 15, 18
United States v. SCRAP, 412 U.S. 669 (1973) 12
Warth v. Seldin, 422 U.S. 490 (1975) 10, 12

Statutes

Fair Housing Act, 42 U.S.C. §3601 *et seq.* ..... passim

Other Authorities

Affirmative Marketing Agreement, Boards of REALTORS® and United States Department of Housing and Urban Development 4
Code of Ethics, National Association of Realtors® 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION and ROSE JONES,

Petitioners,

VS.

SYLVIA COLEMAN, R. KENT WILLIS and HOUSING OPPORTUNITIES MADE EQUAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

AMICUS BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS*

* All parties of record in this case have consented pursuant to Supreme Court Rule 36.2 to the filing of this *amicus* brief in support of petitioners. A record of these consents has been filed with this Court.

INTEREST OF THE NATIONAL ASSOCIATION OF REALTORS®

The decision of the court of appeals is of direct and immediate concern to the National Association of Realtors® (NAR) and its members for the following reasons:

First, it inherently presents for decision the issue of whether or not this Court interprets the Fair Housing Act of 1968 as requiring the distribution of housing in such a way as to produce an integrated housing arrangement.

Second, it expressly presents for decision the issue of whether or not real estate brokers and their salespersons can be sued for alleged violations of the Fair Housing Act by self-selected "civil rights" vigilantes and their employers who are neither bona fide clients or customers of such brokers nor residents of the neighborhoods served by them.

Third, it promises to determine whether or not the purchase, sale or transfer of real estate in this country, both with and without the aid of real estate brokers, will be conducted in an environment of fear, suspicion and exploitation.

I. The Identity Of NAR

The interest of NAR in the decision in this cause can be better understood if the purpose and nature of NAR is appreciated.

Founded in 1908, NAR is headquartered in Chicago, Illinois. It is a non-profit professional association of per-

sons engaged in all phases of the real estate business, including, but not limited to, brokerage, appraising, management, and counseling.

NAR is the owner of various registered service and collective membership marks, including the mark "REALTOR®". Over the years NAR has promoted a public understanding of the term "REALTOR®" as identifying a member of the NAR engaged in the real estate business on a professional basis and subscribing to and bound by a strict Code of Ethics.

NAR has been successful in promoting this understanding and, as a consequence, it is the beneficiary of substantial and significant "good will" which is embodied in its membership marks.

Because of the value of the term "REALTOR®" and also because of the many and varied services available from NAR, real estate boards have sought affiliation with NAR as Member Boards of REALTORS®. Such affiliation is accomplished by the issuance of a charter by NAR affording membership privileges and granting the Board the right to use the term "REALTOR® in the exchange for the Board's agreement to provide service to their members and the public, to enforce the Code of Ethics, and to assist in safeguarding the registered marks of NAR.

Today, the membership of NAR includes 50 State Associations of REALTORS®, over 1,700 Member Boards of REALTORS®, and more than 600,000 REALTOR® and REALTOR-ASSOCIATE® members.

NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR

is concerned with a wide range of activities, including real estate education, home protection, arbitration of member and public controversies, equal opportunity in housing, real estate licensing, public service, neighborhood revitalization, and legislation relating to the real estate business.

II. The Total Commitment Of NAR To Fair And Equal Housing Opportunity

The Code of Ethics of NAR to which all members are required to subscribe, provides, in Article 10:

> The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The REALTOR® shall not be party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin.

This article was adopted by NAR in support of the letter and spirit of the federal Fair Housing Act of 1968 as well as the Civil Rights Act of 1866 as applied by this Court in *Jones v. Mayer Co.*, 392 U.S. 409 (1968).

In further recognition of its legal and moral obligation to fair and equal housing opportunity, NAR established a Code for Equal Opportunity that has been adopted and implemented by every one of its Member Boards.

Through cooperation with the United States Department of Justice and by agreement with the United States Department of Housing and Urban Development (HUD), NAR has developed the first nationwide Affirmative Marketing Agreement in the real estate industry.

The NAR-HUD Affirmative Marketing Agreement, the nation's most successful voluntary compliance pro-

gram in housing, is premised on the understanding that Congress did not intend that the Fair Housing Act should ever be construed so as to limit, restrict or inhibit the right of persons to freely select and determine where they will make their home. Rather, it is the understanding of NAR that Congress intended by the Fair Housing Act to enhance, promote and protect the unfettered right of every American to select the home he can afford in the neighborhood and community of his choice without regard to race, color, sex or national origin.

Over 250,000 of NAR's members have committed themselves to the Affirmative Marketing Agreement and thousands more are being processed each month as fast as HUD is able to incorporate them into the Agreement's Action Program.

Further, and consistent with its total commitment to fair and equal housing opportunity, NAR has initiated a nationwide neighborhood revitalization program to limit urban blight and has coupled this program with a broad range of activities to generate or encourage new sources of home financing for low and moderate income families.

No other trade association in the country has committed more of its time and human and material resources to the recognized goals of the federal fair housing laws than has NAR.

III. Purpose Of This Brief Amicus Curiae

The purpose of NAR in submitting this brief is to present the views of the chief representative of the organized real estate profession as to the effects of the court of appeals' decision if allowed by this Court to stand.

This brief is particularly appropriate in view of the fact that nowhere in the decision of the court of appeals does it appear that the slightest attention was given to the impact or effects of the decision on the real estate brokerage business and those engaged in it or on the voluntary compliance programs of NAR and others.

In its laudable desire to discourage discrimination in housing, the court below has created an instrument of legal harassment and oppression unprecedented in American jurisprudence. In its legitimate concern for the interests of the homeseeker, the court of appeals has countenanced a concept of standing that cannot help but incite litigation, coerce unwarranted settlements, and discourage legitimate business activity.

In considering the Argument presented hereafter, we urge this Court to note particularly the significance of the fact that each of the individual plaintiffs who seek standing herein acted as "testers" in this cause and of the nature of the "testing experience."

The testing experience is premised on pretense. The tester's identity as a homebuyer is fictitious, his housing needs are unreal, and his responses are wholly contrived.

Moreover, the testing experience involves an inherent bias. Testers are usually unpaid and hence are motivated to act as testers by a "special interest" in civil rights problems and a conviction that the targets of the testing are the cause of such problems. Testers, unlike investigators for law enforcement agencies, have no obligation of fairness or balance. On the contrary, testers are free to construe even innocent conduct as evidence of guilt.*

* The inherent bias of testers moved one federal judge to make the following comment on the credibility of tester testimony:

(Footnote continued on following page)

The testing experience is imprecise. Testers often compare the conduct of different salespersons in the same organization, and even where the conduct of the same individual is compared, it is rarely accomplished in comparable circumstances within a reasonably controlled situation. Thus, the perceived "differences" deemed to evidence unequal treatment are often attributable to factors and influences having nothing whatsoever to do with race, creed, sex, or national origin. Because of these infirmities, the product of the testing experience is extremely unreliable. Where, as is the usual case, the only use made of the testing experience is to alert law enforcement agencies to suspected discrimination, the dangers posed by this unreliability can be mitigated by the independent investigation and verification procedures employed by such officials and responsible agencies.

Where, as here, the testing experience becomes the vehicle for the generation of a lawsuit, its unreliability and inherent susceptibility to use (or abuse) as a means of gaining publicity, and coercing unwarranted settlements to avoid the costs of defense, must be considered

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* *continued*

> . . . in this case, the testers were not disinterested witnesses. They instigated this suit; they tested Dwayne Realty in order to advance economic and non-economic interests of theirs they thought were at stake; and they were candid in admitting to having strong feelings against real estate brokers in general, and these defendants in particular, because of developing social conditions in their village which they attributed to them.
>
> . . . When a person has an interest in the outcome of a case; when he harbors strong feelings against a party, the tendency is for him to shape his sensory reactions so that they fit the testimony he wants to give.

Village of Bellwood, et al. v. Dwayne Realty, et al., 482 F.Supp. 1321, 1331 (N.D. Ill. 1979) (Leighton, J.).

in evaluating whether the interests of the tester turned plaintiff represent the type of "personal stake in the outcome of the controversy" that justifies standing. *Flast v. Cohen*, 392 U.S. 83, 99 (1967).

As the ensuing Argument will demonstrate, the metamorphosis of "testers" into plaintiffs does not make reality out of pretense, or produce "injury in fact" from a real estate transaction that "never was".

SUMMARY OF ARGUMENT

The outcome of this case turns on whether this Court intended its decisions in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) and *Gladstone, Realtors® v. Village of Bellwood*, 441 U.S. 91 (1979) to grant standing to sue under the Fair Housing Act, 42 U.S.C. § 3601 *et seq.* to any person prepared to allege a violation of the Act.

This is the effect of the construction placed upon these decisions by the court below. By adopting this construction, the court below found that the individual plaintiffs had standing even though

(a) they were *not* bona fide renters, nor authorized law enforcement agents or investigators, but rather self-appointed testers; and

(b) they failed to allege any facts that would permit a reasonable person to conclude that defendants' conduct denied them a "right to live in an integrated society."

The organizational plaintiff, Housing Opportunities Made Equal (HOME), was also found to have standing even though its "interest" in the litigation was nothing more than a general commitment to the social objective of integrated housing.

The decision of the court below effectively constitutes every citizen a "private attorney general" under the Fair Housing Act and authorizes them to sue any person, firm, corporation or organization whom they believe to be engaged in conduct that denies them "a right to live in an integrated society." The court below would permit these lawsuits to be brought even though there are no guidelines, judicial or otherwise, defining what is meant by "society" or "integrated".

We do not believe that this Court intended its *Trafficante* and *Bellwood* decisions to be so construed. Such a construction is contrary to the Fair Housing Act's stated objectives of equal housing opportunity for all citizens without regard to race, creed, sex, or national origin, and is inconsistent with established Article III principles governing standing to sue in the federal courts.

ARGUMENT

I. Testers Do Not Have Standing Under Article III Of The Constitution

The court below undertook to provide an answer (App. 68-71) to the question this Court expressly declined to answer in *Gladstone, Realtors® v. Village of Bellwood*, 441 U.S. 91, 111 (1979); namely, whether testers *as testers* have standing to sue under the Fair Housing Act and Article III of the Constitution.

We submit the answer of the court below is wrong.

During the nearly two hundred years this Court has been construing Article III of the Constitution, it has never once deviated from, or diluted, the principle of standing that

> a plaintiff . . . must allege specific concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention.

Warth v. Seldin, 422 U.S. 490, 508 (1975). *Accord, Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 260-61 (1977); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976); *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973).

Yet, ignoring this Article III axiom, the court below found that "tester plaintiffs" Willis and Coleman had standing merely and solely because the court could find "no rational reason why . . . bona fide surrogates [of persons actually denied housing on the basis of race] cannot pursue their cause." (App. 71). Declining to for-

mulate *any* rule circumscribing tester standing, the court below concluded that tester standing is permissible in those "areas fundamentally necessary for access to the federal courts . . . or . . . where Congress had recognized a similar deeply-grounded human right." (*Id.*).

Simply put, the court below has, by judicial fiat, amended the Constitution to exempt from Article III those cases brought under the Fair Housing Act by "surrogates" of those actually injured by racial discrimination. This holding is utterly devoid of even a scintilla of precedential support.

Chief Justice Warren summarized completely and succinctly the well established limitations on standing mandated by Article III of the Constitution in these words:

> The judicial power of federal courts is constitutionally restricted to "cases" and "controversies." As is so often the situation in constitutional adjudication, those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by this case-and-controversy doctrine.

Flast v. Cohen, 392 U.S. 83, 94-95 (1968). Chief Justice Warren further defined the inquiry necessary to determine whether Article III's mandate of "adversness" is met: ". . . it is both appropriate and necessary to . . . determine whether there is a logical nexus between the [plaintiff's] status . . . and the claim sought to be adjudicated." *Id.* at 102.

The manifest and accepted purpose of this inquiry is, of course, to determine whether a plaintiff "[has] suffered a particular injury caused by the action challenged as unlawful." *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 220-221 (1974). Unless "injury in fact" is demonstrated, a court is without power to redress that grievance, and its intervention would be, at best, gratuitous. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

This was the holding in *Warth v. Seldin*, 422 U.S. 490 (1975) where residents of Rochester, New York claimed that "exclusionary zoning" by the neighboring community of Penfield unlawfully interfered with their choice of housing and increased their local tax burdens. This Court held that the plaintiffs did not meet Article III's standing requirements because they failed to allege specific facts to show that elimination of Penfield's exclusionary zoning would redress their claimed injuries.

To be sure, a constitutionally cognizable injury need not be economic, *United States v. SCRAP*, 412 U.S. 669 (1973), nor suffered by a limited number of persons, *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). But Article III still requires that there be some rational relationship or nexus between an injury to the plaintiff and the defendant's allegedly wrongful conduct.

The court of appeals cites two cases to justify its holding that tester status alone, and without more,

meets Article III requirements for standing: *Pierson v. Ray*, 386 U.S. 547 (1967) and *Evers v. Dwyer*, 358 U.S. 202 (1958). Neither of these cases, however, support that holding. Both of these cases dealt with black plaintiffs who violated a municipal ordinance requiring racial segregation. The record showed that the plaintiffs in each case violated the ordinance for the express purpose of "testing" the ordinance's constitutionality.

This Court held that the plaintiff's motive for violating the ordinance did not defeat their claim of standing since they had in fact been denied equal access to public facilities on the basis of their race. But this Court did not hold in the *Pierson* and *Evers* cases, and has not held in any other decision, as did the court below, that plaintiffs who had not suffered injury can obtain standing simply because they are "motivated" to test compliance with the law. The lesson of the *Pierson* and *Evers* cases is that "motive" is irrelevant to standing under Article III, neither defeating nor creating it.

By eliminating the constitutionally required nexus between a defendant's conduct and injury to the plaintiff, the court below has more than cut the Fair Housing Act loose from the moorings of Article III. It has committed federal courts to decide "made up cases" involving "hypothetical injury" based on "experimental" situations.

The sole justification of the court below for its willingness to waive injury as a prerequisite to Article III standing is that

> individuals illegally denied housing by subterfuge are, by the nature of the wrongful act, less able than others in our society to require enforcement of the Civil Rights Act through private litigation as private attorneys general. (App. 71).

The fundamental fallacy of this proposition is disproved by the very facts of this case. This lawsuit was filed on behalf of four plaintiffs, only one of whom, Paul Allen Coles, actually sought rental housing from the defendants and allegedly was denied housing of his choice. Defendants did not challenge Coles' standing, and as to him the case went to trial and a judgment was rendered on his behalf. (App. 8). Thus the only individual, Mr. Coles, who was found to have been "illegally denied housing by subterfuge" was not only able, but successful in requiring "enforcement of the Civil Rights Act." Nowhere does the court below give any reason or cite any evidentiary support for its conclusion that victims of housing discrimination are "less able" than others to defend their rights. The conclusion seems rather to be premised solely on a stereotype image of the minority person as ignorant, poor, uneducated, or without governmental and private resources or recourse. We submit this stereotype is not only contrary to fact but is itself a source of discrimination.

This Court has already held that standing under the Fair Housing Act is as broad as permitted by Article III. *Gladstone, Realtors® v. Village of Bellwood*, 441 U.S. 91, 109 (1979). If the statutory provisions of the Fair Housing Act are inadequate to deal with housing discrimination, then the solution lies with Congress. However commendable the goals of the Fair Housing Act may be, the Constitution does not permit federal courts to pursue those goals by ignoring the mandate of Article III.

II. The Individual Plaintiffs Have Not Alleged A Nexus Between Defendants' Conduct And A Denial Of Plaintiffs' Right To Live In An Integrated Society

The lower court held that the individual plaintiffs, Willis and Coleman, had standing, not only in their capacity as testers, but also because they had sufficiently alleged that defendants' conduct had deprived them of their right to live in an integrated society. (App. 71-75). The lower court reached this conclusion even though the most precise definition in plaintiffs' Complaint of the "society" in which they live is "the City of Richmond or Henrico County" Virginia (App. 13), a region containing over 2,000 square miles and over 400,000 people.

Admittedly, this Court held in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972) and *Gladstone, Realtors® v. Village of Bellwood*, 441 U.S. 91 (1979) that deprivation of a right to live in an integrated society is a cognizable injury sufficient to confer standing under the Fair Housing Act. But the manner in which the court below construed *Trafficante* and *Bellwood* demonstrates that the concept of a "right to live in an integrated society" is inherently unworkable in the context of the Fair Housing Act.

It is perhaps feasible to extend Fair Housing Act standing to residents of an apartment complex as in *Trafficante*, or a relatively small and precisely defined neighborhood as in *Bellwood*. In both cases, the number of persons to whom standing would extend is at least ascertainable. Likewise, the injury claimed by the plaintiffs would arguably be redressed by an order prohibiting the defendants from engaging in the racial steering of which they were accused.

But the concept of a right to live in an integrated society is, as the opinion of the court below illustrates,

impossible to limit as a matter of law. For all practical purposes, the concept is nothing more than an intellectual construct that permits suits to be brought under the Fair Housing Act without regard to Article III. The opinion of the court below illustrates why this is true.

The court below held that a plaintiff must be given an opportunity to prove at trial that the racial character of the society in which he lives is affected by the defendants' allegedly wrongful conduct. Thus, the court below permitted the plaintiffs the sole right to secure a trial on the merits using any definition of an affected "society" they choose to allege in their Complaint. In this case the court permitted plaintiffs to allege that the affected "society" could encompass all of metropolitan Richmond. If the holding of the court below is correct, the plaintiffs could as easily have alleged a "society" represented by the State of Virginia, or for that matter, by all fifty states. If the affected "society" can be whatever plaintiffs allege it to be, then the nexus between a plaintiff's claimed injury and the alleged conduct of the defendant required to establish standing is so tenuous that standing to sue for a single act of discrimination could be extended to every citizen in every jurisdiction in which the Fair Housing Act applies. Standing that extends this far trivializes Article III to the point of making it irrelevant.

The absurdity of the lower court's holding is illustrated most starkly by the potential liability it portends for a real estate broker. If a real estate broker can, as the lower court suggests, deny all residents of the Richmond Metropolitan Area of their right to live in an integrated society by engaging in one or more acts of discrimination at one apartment complex, then that broker is presumably liable to each and every citizen of

the Richmond Metropolitan Area for the monetary damages attributable to that injury. Here, the plaintiffs claim each "tester plaintiff" suffered $1,000 in actual damages. If plaintiffs' damage claims are accurate, and the population of the Richmond Metropolitan Area is 400,000, the defendants' potential liability to the tester plaintiffs, and all others similarly situated, is $400,000,000 in actual damages alone.

Simply put, the concept of a "right to live in an integrated society" presupposes the ability of a court to answer certain questions, which we submit are inherently incapable of resolution through the judicial process.

First, a court must define the "society" in which the plaintiff lives. The answer to this question will presumably depend upon the areas within which the plaintiff routinely comes in contact with other people. For some plaintiffs, this could be a single neighborhood. For others who maintain multiple residences, it could be more than one neighborhood in more than one state. For still others, it could be as large as an entire community, or perhaps as small as a single square block.

Second, a court must define what is meant by an "integrated" society. Does "integrated" mean a community has at least one minority resident or does it mean a substantial portion of the community's population is composed of racial minorities? If so, how much is "substantial"? Or, is "integration" to be measured by reference to the racial composition of some other larger community? Also, is "integration" simply a head count or ratio of minority to non-minority residents or, must a society's minority population be evenly dispersed throughout each community?

Third, a court must decide how many "societies" are affected by a single act of racial steering. Is the

"affected society" the community to which the buyer was steered? Or, is it the other communities in which the buyer might have located had he not been steered? An even more intriguing issue is whether the answers to these questions depend upon the race of the person steered and the racial composition of the communities that he is steered to or from.

Efforts to answer these questions will force courts ultimately to confront the issue that is at the root of *Trafficante*, *Bellwood*, and this case: Is the purpose of the Fair Housing Act to guarantee "freedom to choose" housing regardless of race, or is the purpose of the Act to create a court-mandated, defined and supervised "integrated society" using so-called "benign" or "affirmative" racial steering, if necessary, to achieve this result?

The implications presently being drawn from this Court's decisions in *Trafficante* and *Bellwood* are that the purpose of the Fair Housing Act *is* the creation of an integrated society, rather than a guarantee of freedom to choose housing without regard to race. If the purpose of the Act were the latter, this Court could not have recognized a "right to live in an integrated society" since there is no guarantee that individual housing choices, freely made, will result in an integrated society. On the other hand, a "right to live in an integrated society" must necessarily contemplate so-called "benign" or "affirmative" steering, since an integrated society cannot truly be achieved without some race-conscious limitations imposed on individual housing choices.

The possibility that racial steering can be classified as "good" and "bad"—the latter prohibited by the Fair Housing Act and the former mandated by it—subjects sellers of real estate and their agents to intolerable risks

that can only operate to "chill" the right to transfer and sell real estate. It is manifestly impossible for real estate sellers and brokers to assess the demographic consequences of their acceptance or rejection of prospective buyers in terms of whether the "integration" of society is advanced, preserved, or retarded. As a result, every sale, every offering for sale, and, where testers are concerned, every inquiry concerning the availability of a property for sale, represents a potential class action lawsuit brought by persons who are total strangers to the entire transaction.

What all this means, is that this Court must, at some point, reassess whether a "right to live in an integrated society" can ever be a cognizable injury subject to redress through the Fair Housing Act. Or else this Court must be prepared to recognize, as did the court below, that actions brought under the Fair Housing Act are simply not subject to the constitutional limitations of Article III.

III. The Organizational Plaintiff Lacks Standing Under Article III Of The Constitution

The plaintiffs in this lawsuit include a local housing organization, Housing Opportunities Made Equal (HOME), a Virginia non-profit corporation with a multiracial membership of approximately 600 individuals. (App. 13).

On two alternative theories, the court below held that HOME had standing to sue the defendants for racial steering. (App. 75-77). The court held first that HOME had met the representational standing test announced by this Court in *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977), and therefore had standing to represent the individual claims of its mem-

bers. (App. 75-76). The court then held that HOME also had standing to sue for injury to itself as an entity separate and distinct from its membership. (App. 76-77).

Holding that HOME had standing to represent the interests of its members, the court below quoted the following language from this Court's *Hunt* opinion in which the representational standing test is defined:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members.

(App. 75). Without any analysis whatsoever, the court below simply declared that HOME met this test because it alleged that its members "have been deprived of community advantages in the same language utilized by Coleman and Willis." (*Id.*).

Manifestly, if this Court finds, as urged heretofore, that Coleman and Willis do not have standing, then, by the same logic that the court below conferred standing on HOME, this Court should deny such standing. As this Court held, the first prerequisite of representational standing is that an organization's members "would otherwise have standing to sue in their own right." *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

HOME's failure to meet this first prerequisite defeats its representational standing in this case. According to the court below, HOME's members have standing because HOME claims that its members have been de-

prived of the same rights as Willis and Coleman. But the Complaint is even less specific concerning the neighborhood in which any HOME member resides. (App. 13). Indeed, the Complaint is devoid of any allegations revealing the residence or characteristics of a single HOME member.

The court below also found that HOME alleged sufficient injury to confer standing on it directly. (App. 76). As the Complaint in this case states, HOME is a not-for-profit corporation formed for the purpose of engaging in activities designed to further the organization's stated goal of promoting equal housing opportunity.* HOME presumably derives funds to support its activities in whole or in part from membership dues or donations contributed by individuals who share HOME's commitment to its stated goals and objectives. Thus, HOME's organizational structure is no different from thousands of other not-for-profit or charitable organizations, such as the Sierra Club, the Urban League, or the American Red Cross, who engage in activities, funded in part by private donations, designed to advance an objective generally deemed beneficial to society as a whole.

As commendable as the stated objectives of these organizations may be, this Court has held that an

* While HOME professes to support "equal housing opportunity" (App. 13), the relief sought in its Complaint reveals that its purpose is in fact creating or maintaining integrated housing patterns in Richmond. As part of its relief in this case, HOME is asking the district court to order the defendants to "[solicit and encourage blacks] to rent units in predominately white communities and whites to rent such units in predominately black and integrated communities." (App. 19). Thus, HOME seeks to force upon the citizens of Richmond its view of the "ideal" racial composition of a neighborhood through the same tool—racial steering—that forms the gravamen of its Complaint against the defendants.

organization's dedication to a public purpose does not confer standing on it to challenge third party activities that the organization believes are inimical to its goals. This is the holding of *Sierra Club v. Morton*, 405 U.S. 727 (1972) where this Court held that the Sierra Club did not have standing to sue the federal government and private developers to halt construction of a ski resort in the Sequoia National Forest. In its complaint, the Sierra Club claimed that it is a membership organization whose "activities and conduct exhibited a special interest" in maintaining game refuges and forests throughout the country. *Id.* at 735 n.8.

While this Court recognized that "aesthetic and environmental well being, like economic well being," were cognizable interests ". . . deserving of legal protection through the judicial process," *Id.* at 734, it denied standing to the Sierra Club because it failed to demonstrate the existence of "injury in fact."

This Court noted that ". . . 'the injury in fact test' requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured . . ." *Id.* at 735. This Court found that a "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . ." so as to warrant standing to sue. *Id.* at 739.

Had this Court not decided *Sierra Club* the way it did, any group of persons, or even a single individual, could declare themselves dedicated to the enforcement of a particular law, and then initiate litigation against any person they thought was breaking that law, claiming as their injury the resources they expended in pur-

suit of their objective. This is precisely the concern this Court expressed in *Sierra Club* when it said:

> . . . if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. *Id.* at 739-740.

This Court's *Sierra Club* opinion merely reflects the concept of federalism woven into the fabric of the Constitution. The "interests" pursued by organizations like HOME and the Sierra Club in fact represent questions of public policy rather than the private interests of individual citizens. Federalism dictates that public policy is defined through laws adopted by Congress. Once defined into law, public policy is enforced on behalf of the public at large by governmental prosecutors who are ultimately accountable through the electoral process. If the lower court's opinion is permitted to stand, enforcement of the public policy reflected by the Fair Housing Act would be delegated to self-appointed, unelected and wholly unaccountable interest groups whose personal interpretations of that Act may or may not conform with those of the courts, or with the intent of Congress.

CONCLUSION

The Fair Housing Act aims to provide, within constitutional limitations, for fair housing throughout the United States. 42 U.S.C. § 3601. It does not propose to

establish an integrated society or to guarantee any person's right to live in such society. The Act prohibits practices and conduct that deny equal housing opportunity and choice, but nowhere does the Act seek to control how the freedom of housing choice it guarantees will be exercised.

The Act does not mandate quotas but choice; it does not require the assimilation of different groups into one homogenous whole but rather requires the incorporation of individuals of different groups into society as equals.

Standing to sue under the Fair Housing Act should be determined not in terms of a claim of right Congress has not created and the Constitution has not guaranteed. Nor should it be determined on the basis of a case or controversy arising from a theoretical transaction.

For these reasons, NAR respectfully submits that this Honorable Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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No. 80-988

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION and ROSE JONES,
Petitioners,

vs.

SYLVIA COLEMAN, R. KENT WILLIS and
HOUSING OPPORTUNITIES MADE EQUAL,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIA THE NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, INC., THE CUYAHOGA PLAN, ECHO HOUSING ASSISTANCE CENTER, FAIR HOUSING CENTER OF DETROIT, MICHIGAN, FAIR HOUSING CENTER OF TOLEDO, OHIO, FAIR HOUSING CONGRESS OF SOUTHERN CALIFORNIA, FAIR HOUSING COUNCIL OF BERGEN COUNTY, NEW JERSEY, FAIR HOUSING COUNCIL OF ORANGE COUNTY, CALIFORNIA, FAIR HOUSING COUNCIL OF THE SAN FERNANDO VALLEY, GREATER KANSAS CITY HOUSING INFORMATION CENTER, HOUSING COUNCIL OF YORK, PENNSYLVANIA,

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HOUSING OPPORTUNITIES CORPORATION OF MEMPHIS, TENNESSEE,
HOUSING OPPORTUNITIES MADE EQUAL COMMITTEE OF GREATER CINCINNATI,
HOUSING OPPORTUNITIES MADE EQUAL, INC., OF BUFFALO, NEW YORK,
METRO FAIR HOUSING SERVICES OF DECATUR, GEORGIA,
METRO HOUSING RESOURCES OF ST. LOUIS, MISSOURI,
METROPOLITAN FAIR HOUSING COUNCIL OF GREATER OKLAHOMA CITY,
METROPOLITAN WASHINGTON PLANNING AND HOUSING ASSOCIATION,
MIDPENINSULA CITIZENS FOR FAIR HOUSING,
MONTGOMERY COUNTY (OHIO) FAIR HOUSING CENTER,
MORRIS COUNTY (NEW JERSEY) FAIR HOUSING COUNCIL,
NORTHWEST INDIANA OPEN HOUSING CENTER,
OAK PARK (ILLINOIS) HOUSING CENTER,
OPEN HOUSING CENTER, INC. OF NEW YORK CITY,
SUBURBAN MARYLAND FAIR HOUSING, INC.,
SUFFOLK HOUSING SERVICES,
SOUTH SUBURBAN HOUSING CENTER,
WEST SUBURBAN FAIR HOUSING CENTER,
WESTCHESTER RESIDENTIAL OPPORTUNITIES, and WESTSIDE FAIR HOUSING COUNCIL.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... (i)

INTEREST OF AMICI CURIA 1

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. HOME HAS STANDING TO SEEK REDRESS FOR INJURIES SUSTAINED BY THE ORGANIZATION 10

II. HOME HAS STANDING TO SUE ON BEHALF OF ITS MEMBERS 20

A. HOME's Members Have Sustained the Requisite Injury in Fact to Sue on Their Own Behalf 20

B. The Interests of HOME's Members Are Germane to the Interests of the Organization 28

C. Neither the Claims Presented Nor the Relief Requested Requires Individual Participation of HOME's Members 28

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: *Page*

Aiken v. Obledo,
442 F.Supp. 628 (E.D. Cal. 1977) 15,25

Akron Center for Reproductive Health, Inc. v. City of Akron,
479 F.Supp. 1172 (N.D. Ohio 1979) 14

Associated General Contractors of North Dakota v. Otter Tail Power Co.,
611 F.2d 684 (8th Cir. 1979) 30

Association Against Discrimination v. City of Bridgeport,
647 F.2d 256 (2d Cir. 1981) 8

Baird v. Bellotti,
393 F.Supp. 847 (D. Mass. 1975), *vacated and remanded on other grounds,* 428 U.S. 132 (1976) 14

Baker v. Carr,
369 U.S. 186 (1962) 10

Baker v. F & F Investment,
420 F.2d 1191 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970) 8

Broadmoor Improvement Association, Inc. v. Stan Weber & Associates, Inc.,
597 F.2d 568 (5th Cir. 1979) 11,23,27,28

Cedeck v. Hamiltonian Federal Savings & Loan Association,
551 F.2d 1136 (8th Cir. 1977) 8

Citizens Concerned for Separation of Church and State v. City of Denver,
628 F.2d 1289 (10th Cir. 1980) 25

Coles v. Havens Realty Corp.,
3 EOHC (P-H) ¶18,031 (E.D. Va. 1981) 29

Committee for Full Employment v. Blumenthal,
606 F.2d 1062 (D.C. Cir. 1979) 24

Conley v. Gibson,
355 U.S. 41 (1957) 24

Crumble v. Blumthal,
549 F.2d 462 (7th Cir. 1977) 18

Data Processing Service v. Camp,
397 U.S. 150 (1970) 11

Duke Power Co. v. Carolina Environmental Study Group, Inc.,
438 U.S. 59 (1978) 10,11

Environmental Defense Fund v. TVA,
468 F.2d 1164 (6th Cir. 1972) 25

Evers v. Dwyer,
358 U.S. 202 (1958) 13

Fair Housing Council of Bergen County v. Eastern Bergen County Multiple Listing Services, Inc.,
422 F. Supp. 1071 (D. N.J. 1976) 8,22

Fox v. HUD,
416 F.Supp. 954 (E.D. Pa. 1976) 22

Gladstone, Realtors v. Village of Bellwood,
441 U.S. 91 (1979) ..... *passim*

Grant v. Smith,
574 F.2d 252 (5th Cir. 1978) 18

Green v. Griffith,
3 EOHC (P-H) ¶15,289 (S.D. Ohio 1979) 18

Hamilton v. Miller,
477 F.2d 908 (10th Cir. 1973) 18

Harris v. McRae,
448 U.S. 297 (1980) 30

Hospital Building Co. v. Trustees of Rex Hospital,
425 U.S. 738 (1976) 24

Huertas v. East River Housing Corp.,
81 F.R.D. 641 (S.D.N.Y. 1979) 19,25,29

Hunt v. Washington State Apple Advertising Commission,
432 U.S. 333 (1977) 9,20,28,29

Jenkins v. McKeithen,
395 U.S. 411 (1969) 24

Joint Anti-Fascist Refugee Committee v. McGrath,
341 U.S. 123 (1951) 10

Keker v. Procunier,
398 F.Supp. 756 (E.D. Cal. 1975) 15

Linmark Associates, Inc. v. Willingboro,
431 U.S. 85 (1977) 21

Local 194, Retail, Wholesale and Department Store Union v. Standard Brands, Inc.,
540 F.2d 864 (7th Cir. 1976) 29

Marchezak v. McKinley,
607 F.2d 37 (3rd Cir. 1979) 25

Macklin v. Spector Freight Systems, Inc.,
478 F.2d 979 (D.C. Cir. 1973) 8

Massachusetts Hospital Association v. Harris,
500 F.Supp. 1270 (D. Mass. 1980) 15,29

McDonald v. Verble,
622 F.2d 1227 (6th Cir. 1980) 12

McNeil v. P-N & S., Inc.,
372 F.Supp. 658 (N.D. Ga. 1973) 12

Meek v. Pittenger,
421 U.S. 349 (1975) 20

Mountain States Legal Foundation v. Costle,
630 F.2d 754 (10th Cir. 1980), *cert. denied*,
101 S. Ct. 1770 (1981) 16,17

Mulqueeny v. National Commission on the Observance of International Women's Year, 1975,
549 F.2d 1115 (7th Cir. 1977) 16,17

NAACP v. Alabama,
357 U.S. 449 (1958) 10

National Collegiate Athletic Association v. Califano,
622 F.2d 1382 (10th Cir. 1980) 24

National Constructors Association v. National Electrical Contractors Association, Inc.,
498 F.Supp. 510 (D. Md. 1980) 30

National Motor Freight Association v. United States,
372 U.S. 246 (1963) 20

Northside Realty Associates v. Chapman,
411 F.Supp. 1195 (N.D. Ga. 1976) 18

Park View Heights Corp. v. City of Black Jack,
467 F.2d 1208 (8th Cir. 1972) 12

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 10

Pierson v. Ray,
386 U.S. 547 (1967) 13

Planned Parenthood Association of Kansas City v. Ashcroft,
483 F.Supp. 679 (W.D. Mo. 1980) 14

Preterm, Inc. v. Dukakis,
591 F.2d 121 (1st Cir. 1979), *cert. denied,* 441
U.S. 958 (1979) 25

Save the Bay, Inc. v. United States Corps of Engineers,
610 F.2d 322 (5th Cir. 1980) 24

Schlesinger v. Reservists Committee to Stop the War,
418 U.S. 208 (1974) 13,16,19

Scientists Institute for Public Information v. Atomic Energy Commission,
481 F.2d 1079 (D.C. Cir. 1973) 15

Shannon v. HUD,
436 F.2d 809 (3d Cir. 1970) 22

Sherman Park Community Association v. Wauwatosa Realty Co.,
486 F.Supp. 838 (E.D. Wis. 1980) 22,25,26,28

Sierra Club v. Morton,
405 U.S. 727 (1972) 11,15,17,26

Simon v. Eastern Kentucky Welfare Rights Organization,
426 U.S. 26 (1976) 11,16

Smith v. Stechel,
510 F.2d 1162 (9th Cir. 1975) 18

South East Chicago Commission v. HUD,
343 F.Supp. 62 (N.D. Ill. 1972) 22

Steele v. Title Realty Co.,
478 F.2d 380 (10th Cir. 1973) 12

TOPIC v. Circle Realty,
532 F.2d 1273 (9th Cir.), *cert. denied,* 429 U.S.
859 (1976) 23

Trafficante v. Metropolitan Life Insurance Co.,
409 U.S. 205 (1972) 11,13,17,21,22,27

Turner v. A.B. Carter, Inc.,
85 F.R.D. 360 (E.D. Va. 1980) 23

United States v. Long,
1 EOHC (P-H) ¶ 13,631 (D.S.C. 1972), *modified as to relief and aff'd*, 1 EOHC (P-H) ¶ 13,733 (4th Cir. 1974) 12

United States v. Reddoch,
1 EOHC (P-H) ¶ 13,569 (S.D.Ala.), *aff'd*, 467 F.2d 896 (5th Cir. 1972) (per curiam) 12

United States v. SCRAP,
412 U.S. 669 (1973) 11

United States v. Wisconsin,
395 F.Supp. 732 (W.D. Wis. 1975) 18

United States General, Inc. v. City of Joilet,
432 F.Supp. 346 (N.D. Ill. 1977) 18

Village of Arlington Heights v. Metropolitan Housing Development Corp.,
429 U.S. 252 (1977) 10,11,18,19

Village of Forest Park v. Fairfax Realty,
1 EOHC (P-H) ¶ 13,699 (N.D. Ill. 1975) 22

Village of Bellwood v. Gladstone Realtors,
569 F.2d 1013 (7th Cir. 1978), *aff'd*, 441 U.S. 91 (1979) 12,16,17

Warth v. Seldin,
422 U.S. 490 (1975) ..... *passim*

Wharton v. Knefel,
562 F.2d 550 (8th Cir. 1977) 18

Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.,
429 F.Supp. 486 (E.D.N.Y. 1977) 22,25,28

Wounded Knee Legal Defense/Offense Committee v. F.B.I.,
507 F.2d 1281 (8th Cir. 1974) 15

CONSTITUTIONAL PROVISIONS:

U.S. Const. art. III 11,15,21

STATUTES:

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* 8

Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* 1

42 U.S.C. 3602(d) 11
42 U.S.C. 3604(a) 13
42 U.S.C. 3604(d) 9,12,13
42 U.S.C. 3612 23
42 U.S.C. 3617 18

OTHER AUTHORITIES:

Note, *Informational Injuries as a Basis for Standing*, 79 Colum. L. Rev. 366 (1979) 15

Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 Cornell L. Rev. 390 (1980) 24

Fed. R. Civ. P. 54(b) 23

Fed. R. Civ. P. 60(b)(6) 23

INTEREST OF AMICI CURIA

The National Committee Against Discrimination in Housing, Inc. (NCDH) and its affiliated fair housing centers submit this brief as amici curia in support of the respondents.[1] In particular, amici urge that this Court affirm the judgment of the United States Court of Appeals for the Fourth Circuit that respondent Housing Opportunities Made Equal, Inc. (HOME) has standing to maintain this action.

NCDH is a private nonprofit corporation founded in 1950 to eliminate racial discrimination in housing and promote the principle of equal housing opportunity. NCDH carries out programs of research, training, public information, and litigation aimed at achieving the goal of fair housing in fact, as well as in legal theory. Among other things, NCDH played an active role in securing passage of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601 *et seq.* (hereafter "the Fair Housing Act"). NCDH also serves as the national spokesman for approximately 50 local fair housing centers, many of which have expressly joined in this brief.

Fair housing centers are locally based organizations dedicated to achieving the goal of open housing within their own community or metropolitan area. These organizations vary in size, origin, and function. Some, such as the West Suburban Housing Center of Glen Ellyn, Illinois, and Metro Fair Housing Services of Decatur, Georgia, were founded by local residents in response to specific problems or

[1] All parties of record have consented to the filing of this brief pursuant to Supreme Court Rule 36.2. Letters indicating the consent of the parties have been filed with this Court.

practices, such as blockbusting, racial steering, panic selling, or redlining. These organizations tend to focus their activities on eliminating particular practices which have a direct, adverse impact on their community.

Others, such as the Metropolitan Milwaukee Fair Housing Council, the Fair Housing Center of Toledo, Ohio, and Metropolitan Washington Planning and Housing Association are essentially advocacy organizations established by local citizens or community groups to combat all forms of housing discrimination within a large metropolitan area. These organizations engage in a wide range of activities which may include lobbying for enactment of fair housing legislation, researching new or subtle forms of housing discrimination, working with the real estate or construction industries for expansion of housing opportunities, and providing technical assistance or training to government agencies or private organizations.

Still others, such as the Open Housing Center of New York City, the Greater Kansas City Housing Information Service, the Fair Housing Council of the San Fernando Valley, and the Cuyahoga Plan of Cleveland, are primarily service organizations formed to promote fair housing and expand housing opportunities through the provision of client services. Respondent HOME is one such organization.

Two of the most common-and most important-services provided by fair housing organizations are fair housing complaint assistance and housing counseling and referral services. Organizations which provide the first type of service generally respond to complaints from individuals who believe they have been denied housing on a prohibited basis, by dispatching a "tester," "auditor," or "checker" of a different race or sex to inquire about the same housing

opportunity sought by the complainant. The purpose of this inquiry is to ascertain whether the dwelling is still available and whether similarly situated individuals are being treated differently based on their race, sex, or national origin. If the test indicates that a discriminatory housing practice may have taken place, the organization attempts to conciliate the matter by securing the desired housing for the complainant. If these efforts fail, the center either helps the victim file a complaint with an appropriate enforcement agency or refers the complainant to a private attorney. Because it is often impossible for minority homeseekers to determine whether they have been denied housing for discriminatory reasons without such outside assistance, these organizations and their employees play an indispensable role in securing the homeseeker's right to equal opportunity in housing. *See* n.12 *infra.*

Fair housing organizations which offer the second type of service seek to expand housing opportunities and, in some cases, combat the effects of racial steering, by making housing information available to all homeseekers regardless of race. Under these programs, professional housing counselors or trained volunteers provide clients with a list of vacancies within the client's price range, including units in areas from which the client's race previously has been excluded. The housing counselor then furnishes information on schools, jobs, public services, and other amenities in the community and instructions on how to proceed to look for a dwelling. Some programs also provide transportation and escort services to assist the homeseeker in actually securing a unit. To ensure the accuracy of its information, most of those organizations conduct regular surveys, both by telephone and on-site visits, to update their list of available units. Many also undertake fair housing "tests" or "audits"

as a means of verifying the accuracy of their information and determining whether housing opportunities are, in fact, being made available on a nondiscriminatory basis. Like the investigation of fair housing complaints, this service plays a fundamental role in assisting others in the exercise of their right to equal opportunity in housing.

Most fair housing centers offer their services to the public free of charge. In addition, many centers are now providing these services pursuant to contracts with local governments or private firms. For example, the Westside Fair Housing Council of Los Angeles, the Metropolitan Fair Housing Council of Greater Oklahoma City, the Housing Opportunities Corporation of Memphis, and Housing Opportunities Made Equal of Greater Cincinnati, among others, receive funding from local governments to operate a fair housing complaint service for city residents. Similarly, the Fair Housing Council of Bergen County, the Open Housing Center of New York City, the Fair Housing Center of Detroit, and respondent HOME are under contract with municipal governments or local corporations to provide housing counseling and referral services either to municipal residents or corporate employees.

In light of the goals, functions, and activities of fair housing centers, it is apparent that these organizations have a vital interest in the outcome of this litigation. In the case at bar, HOME seeks to establish standing, first, on its own behalf to redress an alleged interference with the operation of one of its principal service programs, and second, on behalf of its members to secure their right to the benefits of interracial associations. As noted above, many fair housing centers operate professional service programs similar to those run by HOME. Accordingly, it is important for these organizations that HOME be accorded standing to challenge

conduct which directly interferes with the efficient operation of its programs. Similarly, many fair housing organizations were founded by residents of a community for the express purpose of protecting their right to live in an integrated society. Accordingly, these organizations are deeply concerned that HOME be permitted to bring this action to assert the very rights of its members which it was formed to protect. It is for these reasons that amici submit this brief in support of the respondents and urge that this Court affirm the judgment of the court below.

STATEMENT OF THE CASE

HOME is a membership organization whose principal purpose is "to make equal opportunity in housing a reality in the Richmond Metropolitan Area." (App. 13).[2] Its goals include eliminating "unlawful racially discriminatory housing practices that cause injury to its members" and to persons who reside, or wish to reside, in the Richmond metropolitan area and securing to "all such persons the right to the important social, professional, business, economic and political benefits of interracial associations that arise from living in integrated communities." *Id.*

To achieve these goals, HOME engages in a number of programs and activities. Chief among these is a housing counseling and referral service designed "to assist and aid individuals of all races in obtaining housing throughout the Richmond Metropolitan Area." (App. 14). HOME also operates a discrimination complaint service geared toward "[i]nvestigating allegations of discrimination and referring complaints to appropriate state and federal agencies." *Id.*

[2]All references to the "App." are to the Joint Appendix.

These services are similar to those furnished by other fair housing organizations.

During the period covered by the complaint, HOME operated a portion of its housing counseling and referral service pursuant to a contract with the City of Richmond.[3] Under this contract, HOME agreed to develop and maintain up-to-date information about housing vacancies in the Richmond area. Among other things, the contract required on-site visits by HOME employees to gather information concerning the cost, location, and suitability of available units. DGS Contract #98167E, p. 11. This information was to be used by HOME counselors in helping clients locate suitable dwellings in the Richmond area. *Id.* at 11. The contract also contained performance standards which required HOME, during the contract period, to identify no fewer than 360 low cost housing vacancies and serve no fewer than 600 clients from the City of Richmond. *Id.* at 12.

On January 9, 1979, HOME brought this action, along with co-plaintiffs Paul Allen Coles, Sylvia Coleman, and R. Kent Willis, to challenge a pattern of racially discriminatory housing practices engaged in by petitioner Havens Realty Corporation and one of its employees. According to the complaint, respondents Coleman and Willis were employed by HOME and "consulted with defendants with regard to available rentals in the course of their employment." (App. 13).[4] The complaint alleges that during these and subsequent contacts with petitioner Havens Realty, HOME employees

[3] *See* DGS Contract #98167E, appended to the Brief of Amicus Curiae City of Richmond, which provided funding for a "Low Cost Rental Housing Locator Service" for the period from August 22, 1977 to August 21, 1978.

[4] The initial contacts with petitioner Havens Realty were made in connection with HOME's Low Cost Rental Housing Locator Service Project. *See* n.3 *supra*.

Sylvia Coleman, R. Kent Willis, and John Barr were given conflicting information concerning vacancies in petitioners' apartment complexes depending on the race of the employee. (App. 16-17).[5] For example, respondent Coleman, who is black, was repeatedly informed by the petitioners that no apartments were available in predominantly white buildings when, in fact, there were suitable vacancies. *Id.*

The complaint further alleges that the petitioners engaged in a persistent pattern and practice of racial steering by showing only white customers rental units in a building occupied primarily by whites, refusing or failing to show black customers rental units in that building, and on occasion steering black customers toward an apartment building which had a greater number of blacks. (App. 15). The complaint also states that the practice of racial steering "contributes to maintaining existing neighborhood segregation and inhibits the development of stable racially integrated neighborhoods." (App. 14).

Finally, with respect to the injury sustained by HOME, the complaint states that "HOME has been frustrated by defendants' racial steering practices in its efforts to assist equal access to housing through counseling and other referral services" and "has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory practices." (App. 17). In addition, it alleges that "HOME members have, as a result of defendants' practices, been deprived of the right to the important social, professional, business and economic,

[5]While the complaint does not identify John Barr as an employee of HOME, it is readily inferable from his description as a tester that he was acting on behalf of HOME. Moreover, plaintiffs have indicated that during this period he was, in fact, employed by HOME. (App. 40).

political and aesthetic benefits of interracial associations that arise from living in integrated communities...." (App. 17-18).

On February 16, 1979, the district court entered an order dismissing HOME, Coleman, and Willis as party plaintiffs on the ground that they lacked standing to sue. (App. 33-34).[6] On September 18, 1980, the United States Court of Appeals for the Fourth Circuit reversed the decision of the district court and remanded. (App. 63-81). This Court granted certiorari on April 20, 1981.

SUMMARY OF ARGUMENT

I

Respondent HOME has standing to sue on its own behalf. HOME has alleged a concrete injury to itself resulting from

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[6]The district court also held that all claims under the Fair Housing Act which were based on acts that occurred more than 180 days prior to the filing of the complaint were time barred. (App. 33). Since at least one act of discrimination which adversely affected HOME - the incident involving John Barr on July 13, 1978 - occurred within 180 days of the filing of the complaint, HOME's claims under the Fair Housing Act are not time barred.

In addition, the acts of discrimination described in the complaint constitute a continuing practice of racial steering whose limitation period did not commence to run until the last act of discrimination alleged in the complaint. As more fully discussed in the Brief of Respondents, the principle of continuing violations has been held to apply both to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq., see, e.g., Ass'n Against Discrimination v. City of Bridgeport,* 647 F.2d 256 (2d Cir. 1981); *Cedeck v. Hamiltonian Federal Savings & Loan Ass'n,* 551 F.2d 1136 (8th Cir. 1977); *Macklin v. Spector Freight Systems, Inc.,* 478 F.2d 979 (D.C. Cir. 1973); and to the Fair Housing Act. *See. e.g., Baker v. F & F Investment,* 420 F.2d 1191 (7th Cir.), *cert. denied,* 400 U.S. 821 (1970); *Fair Housing Council of Bergen County v. Eastern Bergen County Multiple Listing Serv. Inc.,* 422 F. Supp. 1071 (D.N.J. 1976).

the petitioners' illegal practice of racial steering. Specifically, HOME has been deprived of its right, under section 804(d) of the Fair Housing Act, 42 U.S.C. 3604(d), to receive accurate information on housing vacancies without regard to race. In addition, the petitioners' unlawful conduct has interfered with HOME's ability to render effective service to its clients under its housing counseling and referral program.

The fact that HOME operates its housing counseling and referral service out of a desire to achieve open housing in the Richmond metropolitan area, rather than to make a profit, does not deprive the organization of standing to sue on its own behalf. Regardless of its motivation in undertaking these activities, HOME has alleged an injury in fact to the efficient operation of one of its principal programs.

II

HOME also has standing to sue on behalf of its members. HOME has alleged that the petitioners' practice of racial steering has inhibited the development of racially integrated neighborhoods within Henrico County and, as a result, has deprived HOME members of the important benefits of interracial associations that arise from living in integrated communities. These injuries are sufficient to confer standing on HOME as a representative of its members under the Court's decisions in *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91 (1979) (hereafter *"Village of Bellwood")* and *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. 333 (1977).

While the complaint in this case does not specify where HOME's members reside, one can readily infer from the complaint that some HOME members reside in those neighborhoods in Henrico County which are directly

affected by the petitioners' practices. Indeed, on remand Home will attempt to establish that some of its members actually reside in one of the apartment complexes involved in this case. Accordingly, since this case is still at the pleading stage, the allegations are sufficient to confer standing on HOME to sue as a representative of its members.

ARGUMENT

I.

HOME HAS STANDING TO SEEK REDRESS FOR INJURIES SUSTAINED BY THE ORGANIZATION

Organizations are entitled to sue on their own behalf to redress injuries to themselves. *NAACP* v. *Alabama,* 357 U.S. 449 (1958); *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1951); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). When an organization seeks to establish standing to sue on its own behalf, the question is, as with other litigants, "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' [as] to warrant his invocation of federal court jurisdiction." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 261 (1977), *quoting Warth* v. *Seldin,* 422 U.S. 490, 498-99 (1975), and *Baker* v. *Carr,* 369 U.S. 186, 204 (1962). As defined by this Court, this requirement means that a plaintiff must show that he personally has suffered some actual or threatened injury as a result of the defendant's conduct and that his injury is likely to be redressed by the relief requested. *Village of Bellwood,* 441 U.S. at 99-100; *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 72 (1978);

Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 28 (1976).

This injury need not be of great or special significance. *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973). Nor must the requisite harm be pecuniary in nature. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. at 262-63; *Sierra Club* v. *Morton*, 405 U.S. 727, 734 (1972); *Data Processing Service* v. *Camp*, 397 U.S. 150, 154 (1970). Nevertheless, the injury must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. at 501, and must be one sustained by the organization itself. *Id.*[7]

In the instant case, HOME is a "person," as defined by the Fair Housing Act, 42 U.S.C. 3602(d), and therefore, is entitled to sue to enforce rights afforded to persons under the Act. *Broadmoor Improvement Association, Inc.* v. *Stan Weber & Associates, Inc.*, 597 F.2d 568, 569 (5th Cir.

[7]This Court has also held that there are prudential limitations on standing which, among other things, require that plaintiffs assert their own legal rights and not rely on the legal rights of third parties. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. at 80; *Warth v. Seldin*, 422 U.S. at 499.

In *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), residents of an apartment complex brought an action under the Fair Housing Act to vindicate the rights of nonparties who had been denied apartments because of their race. In holding that the tenants had standing, this Court noted that Congress intended standing under the Fair Housing Act to be "as broa|d| as is permitted by Article III of the Constitution," thereby overriding prudential concerns about standing. *Id.* at 209. *See also Village of Bellwood*, 441 U.S. at 109. Moreover, in the instant case, respondent HOME sues to enforce its own legal rights under the Fair Housing Act. Accordingly, this case does not involve jus tertii standing and prudential limitations on standing simply do not come into play.

1979); *Village of Bellwood* v. *Gladstone Realtors*, 569 F.2d 1013, 1020 n.8 (7th Cir. 1978), *aff'd on other grounds*, 441 U.S. 91 (1979); *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208, 1214 (8th Cir. 1972). Section 804(d) of the Fair Housing Act provides that it shall be unlawful:

> To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

42 U.S.C. 3604(d). This prohibition against providing false information creates a concomitant right to receive accurate information about housing availability without regard to race or color. *McDonald* v. *Verble*, 622 F.2d 1227 (6th Cir. 1980); *United States* v. *Long*, 1 EOHC (P-H) ¶ 13, 733 (4th Cir. 1974).

As noted above, Coleman, Willis, and Barr were employed by HOME, and thus, were acting on behalf of HOME when they sought information about rental vacancies from petitioner Havens Realty. *Steele* v. *Title Realty Co.*, 478 F.2d 380 (10th Cir. 1973). According to the complaint, petitioners repeatedly furnished HOME employees with conflicting information about vacancies based solely on the race of the employee. This conduct constitutes a violation of HOME's right to receive accurate information under section 804(d) of the Fair Housing Act. 42 U.S.C. 3604(d). *See McDonald* v. *Verble*, 622 F.2d at 1233; *United States* v. *Long*, 1 EOHC (P-H) ¶ 13,631, at 14,091; *McNeil* v. *P-N & S., Inc.*, 372 F. Supp. 658 (N.D. Ga. 1973); *United States* v. *Reddoch*, 1 EOHC (P-H)

¶ 13,569 (S.D. Ala.), *aff'd*, 467 F.2d 896 (5th Cir. 1972) (per curiam).[8]

This Court has consistently acknowledged that the deprivation of a statutory right, without more, constitutes a harm sufficient to confer standing. *Warth* v. *Seldin*, 422 U.S. at 500; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 212 n.3 (1974); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring). Accordingly, HOME has satisfied the constitutional prerequisites for standing.

In the instant case, moreover, the injury to HOME constitutes far more than a technical violation of a statutory right. HOME asserts a distinct injury to the operation of its housing counseling and referral service resulting from the petitioners' unlawful conduct. Because the effectiveness of HOME's service depends on the accuracy of its information, the petitioners' provision of inaccurate information to HOME employees, in violation of the Fair Housing Act, directly interferred with HOME's ability to render reliable and effective service to its clients.

In addition, under its contract with the City of Richmond,

[8]In this regard, it is not legally significant that the information here was sought by an entity which intended to use it to assist others in locating housing, rather than by an individual who offered to rent the apartment himself. Unlike the language contained in section 804(a) of the Act, 42 U.S.C. 3604(a), which proscribes a refusal to sell or rent a dwelling on a prohibited basis *only after* "a bona fide offer" to rent or purchase has been made, section 804(d) contains no such restriction. Indeed, the fact that HOME and its employees may have been motivated in part by a desire to test whether housing was being made available on a nondiscriminatory basis is irrelevant for purposes of determining whether they have sustained an injury sufficient to confer standing. *Pierson v. Ray*, 386 U.S. 547, 558 (1967); *Evers v. Dwyer*, 358 U.S. 202, 204 (1958).

HOME was obligated to gather information on no fewer than 360 rental vacancies in the Richmond metropolitan area and make that information available to at least 600 clients. Therefore, petitioners' allegedly discriminatory conduct interfered with HOME's ability, not only to conduct its ordinary operations, but also to carry out its contractual obligations to the City of Richmond.

Furthermore, once HOME determined that the petitioners might be treating white and black homeseekers differently based solely on their race, it had to devote additional resources toward identifying and counteracting these racially discriminatory practices. This, in turn, interfered with the efficient operation of HOME's counseling and referral service by requiring HOME to divert resources away from assisting other clients in locating housing.

Courts frequently have conferred standing on nonprofit organizations based on allegations of interference with the organization's provision of services to their clients. For example, in *Baird* v. *Bellotti*, 393 F. Supp. 847 (D. Mass. 1975), *vacated and remanded on other grounds*, 428 U.S. 132 (1976), a three-judge court found that a nonprofit corporation providing abortion counseling and related services had standing to challenge a state anti-abortion law, not only because the organization conceivably might become subject to criminal liability, but also "by the recognition that even general enforcement of the statute against physicians alone would seriously interfere with its ongoing activities." 393 F. Supp. at 851. *Accord Planned Parenthood Association of Kansas City* v. *Ashcroft*, 483 F. Supp. 679, 683 (W.D. Mo. 1980); *Akron Center for Reproductive Health, Inc.* v. *City of Akron*, 479 F. Supp. 1172, 1183-84 (N.D. Ohio 1979). Similarly, in *Wounded*

Knee Legal Defense/Offense Committee v. *F.B.I.*, 507 F.2d 1281 (8th Cir. 1974), an organization formed to provide free legal services to defendants in criminal cases was held to have standing to maintain an action against the F.B.I. based on allegations that the Bureau had interfered with the organization's efforts to provide effective legal services to its clients. *Accord Keker* v. *Procunier*, 398 F. Supp. 756, 765 (E.D. Cal. 1975).[9]

In their brief, petitioners correctly point out that HOME's standing cannot be grounded solely on its abiding interest in eliminating unlawful discrimination in housing. Brief for Petitioners, p. 19. In *Sierra Club* v. *Morton, supra*, this Court held that an organization's abstract concern with a social problem does not provide a substitute for the concrete injury required by Article III. In so holding, this Court

[9]*See also Scientists Inst. for Pub. Information* v. *Atomic Energy Comm'n*, 481 F.2d 1079, 1086-87 n.29 (D.C. Cir. 1973) (nonprofit organization, whose activities included publication of scientific information relevant to important social issues, had standing to challenge an agency's decision not to provide an impact statement on one of its programs based on the claim that the decision interfered with the organization's ability to publish information on the program); *Mass. Hosp. Ass'n* v. *Harris*, 500 F. Supp. 1270 (D. Mass. 1980) (nonprofit hospital association had standing on its own behalf to challenge procedures used to adopt state medicaid reimbursement regulations and to mount facial challenge to the regulations, based on its claim that the regulations denied it participation in the ratemaking process, contary to federal requirements); *Aiken* v. *Obledo*, 442 F. Supp. 628 (E.D. Cal. 1977) (nonprofit corporation providing legal services to indigents had standing to challenge the Secretary of Agriculture's failure to publish food stamp certification instructions on the grounds that the failure interfered with the corporation's ability to represent its clients effectively.) *See also* Note, *Informational Injuries as a Basis for Standing*, 79 Column. L. Rev. 366 (1979).

reaffirmed that, to satisfy the constitutional requirements of standing, a plaintiff must allege not only that there has been injury in fact to someone, but that the plaintiff himself "is among the injured." 405 U.S. at 735. *Accord Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. at 39-40; *Schlesinger* v. *Reservists Committee to Stop the War,* 418 U.S. at 220-21.

In challenging HOME's right to sue on its own behalf, petitioners argue that HOME is an organization "having nothing more than an abstract concern with housing discrimination" (Brief for Petitioners, p. 21), and that to accord HOME standing necessarily means that *"any* organization with an interest in *any* problem, ...is similarly injured by the existence of the problem itself." *Id.* at 20 (emphasis in original). [10] Petitioners' argument, however, misconceives the basis for HOME's standing and the import of this Court's decisions on organizational standing.

First, HOME does not predicate its right to sue on an abstract concern for open housing. Rather, it alleges that there has been both a violation of its own statutory right and a concrete injury to the operation of one of its services resulting from that violation. It is on these grounds that the instant case differs so sharply from cases in which organizational standing has been denied. *See, e.g., Mountain States Legal Foundation* v. *Costle,* 630 F.2d 754 (10th Cir. 1980), *cert. denied,* 101 S.Ct. 1770 (1981); *Village of Bellwood* v. *Gladstone Realtors, supra; Mulqueeny* v. *National Commission on the Observance of International Women's Year, 1975,* 549 F.2d 1115 (7th Cir. 1977). For example, in none of the cases cited above

[10] Amicus National Association of Realtors (NAR), in making this same point, characterizes HOME and its employees as "self-selected 'civil rights' vigilantes." Brief of NAR, p. 2.

were there allegations that the defendants' conduct hampered or interfered with the organization's ability to conduct its daily business or carry out its programs. Instead, plaintiffs' standing in those cases allegedly was grounded on the claim that the challenged conduct either was inimical to the organization's principles or would result in a setback to the organization's goals.[11]

Second, the fact that HOME undertook to operate a housing counseling and referral service based on its altruistic desire to promote fair housing, rather than for pecuniary ends, does not undercut the organization's standing to maintain this action. Neither *Sierra Club* nor its progeny stand for the proposition that an organization's special interest in a social problem automatically precludes the organization from invoking federal-court jurisdiction.[12] In

[11]In *Mountain States*, the court expressly noted that the organizational plaintiff did not contend that "the challenged EPA actions will in anywise impair [the organization's] functions and activities." 630 F.2d at 767. Similarly, in *Mulqueeny*, the plaintiff did not allege that the challenged conduct interfered with the organization's ability to carry out its programs or activities, but only that the defendant's actions might result in the legislative defeat of a position advocated by the organization. 549 F.2d at 1119, 1121. Finally, in *Village of Bellwood*, the fair housing organization failed to allege that the defendants' conduct interfered with its provision of housing counseling or other services to its clients. In that case, the only allegation of injury to the organization was a general claim that the defendants' conduct "interferes with the Council's mission and costs it funds to attack." 569 F.2d at 1017.

[12]Indeed, far from precluding organizational standing, HOME's abiding interest in open housing demonstrates the importance of according it standing to redress injuries to its ongoing operations. HOME's goals of furthering fair housing and promoting development of integrated communities do not reflect merely its abstract notion of the public good. Rather, they represent a national policy which "Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. at 211.

(continued)

Village of Arlington Heights v. *Metropolitan Housing Development Corp., supra,* this Court held that an organizational plaintiff had standing to challenge interference with its proposed construction of a subsidized housing project, regardless of whether the organization had sustained financial loss as a result of the defendants' conduct. In that case, the organization was accorded standing notwithstanding the fact that "[i]ts interest in building [the project] stem[med] not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce." 429 U.S. at 263. Similarly, in one recent case, in which organizational plaintiffs that provide housing referral services were accorded standing to raise claims of racial discrimination, the court made this same point in language which applies forcefully to the case at bar:

> . . .In the context of the instant case, there is no doubt that the organizational plaintiffs would have standing if they acted as paid referral agencies for low-income apartment seekers and lost profits because of racial discrimination in housing. The fact that the organizations provide identical services but do so without charge should not affect their claim to standing.

(footnote continued from preceding page)

Courts have consistently recognized that organizations such as HOME, and their employees, play an indispensable role in implementing that policy and in securing the enforcement of important federal statutory rights. *Grant v. Smith,* 574 F.21d 252, 254 n.3 (5th Cir. 1978); *Wharton v. Knefel,* 562 F.2d 550, 554 (8th Cir. 1977); *Hamilton v. Miller,* 477 F.2d 908, 909-10 n.1 (10th Cir. 1973). For this reason, both Congress and the courts have afforded special protection to organizations and individuals, such as these, which encourage or aid others in the exercise of their rights to equal opportunity in housing. *See, e.g.,* 42 U.S.C. 3617; *Green v. Griffith,* 3 EOHC (P-H) ¶ 15,289 (S.D. Ohio 1979); *Northside Realty Assocs. v. Chapman,* 411 F. Supp. 1195 (N.D. Ga. 1976); *United States v. Wisconsin,* 395 F. Supp. 732 (W.D. Wis. 1975). *Cf. Crumble v. Blumthal,* 549 F.2d 462 (7th Cir. 1977); *Smith v. Stechel,* 510 F.2d 1162 (9th Cir. 1975); *United States General, Inc. v. City of Joliet,* 432 F. Supp. 346, 352 (N.D. Ill. 1977).

> The touchstone should not be remuneration, then, but rather the nature of the organization's function. If it merely monitors and perhaps publicizes a problem, it suffers no injury in fact when the problem worsens. If, however, the organization takes an active role in combatting a social ill, by, for example, the provision of services to clients, it may suffer injury in fact when relevant laws are violated, regardless of whether the organization is motivated by the desire for profit or by social conscience.

Huertas v. *East River Housing Corp.*, 81 F.R.D. 641, 652-53 n.16 (S.D.N.Y. 1979). Thus, when an organization alleges a concrete injury to its own operations and not just a setback to its abstract principles, the organization has standing, irrespective of the underlying motive for its activities.

Finally, as noted above, HOME was under special contract with the City of Richmond to furnish housing counseling services to city residents. Therefore, petitioners' conduct not only interfered with HOME's ability to carry out its normal operations. It also interfered with the organization's ability to fulfill its contractual obligations to the City of Richmond.

In short, here, it is HOME's personal interest in ensuring the efficient operation of one of its service programs which supplies the "essential dimension of specificity" necessary to confer standing on the organization. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. at 263; *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. at 221.

II.

HOME HAS STANDING TO SUE ON BEHALF OF ITS MEMBERS

Even in the absence of injury to itself, an organization may have standing solely as a representative of its members. *Warth* v. *Seldin*, 422 U.S. at 511; *Meek* v. *Pittenger*, 421 U.S. 349, 355-56 n.5 (1975); *National Motor Freight Association* v. *United States*, 372 U.S. 246 (1963).

To establish representational standing, an organization must allege that "its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action" and that "the nature of the claim and of the relief does not make individual participation of each injured party indispensable" to the resolution of the suit. *Warth* v. *Seldin*, 422 U.S. at 511. More recently, this Court held that:

> . . . an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. at 343. In the case at bar, HOME has satisfied all three requirements for representational standing.

A. HOME's Members Have Sustained The Requisite Injury in Fact to Sue on Their Own Behalf

As noted above, *supra* n. 7, Congress has defined standing under the Fair Housing Act to be as broad as permitted by

Article III, thereby setting aside prudential limitations on standing. *Village of Bellwood*, 441 U.S. at 109; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. at 209. Consequently, to establish standing to prosecute claims under the Fair Housing Act, a plaintiff need only show that he personally has suffered an injury in fact as a result of the defendant's putatively unlawful conduct. *Village of Bellwood*, 441 U.S. at 99-100.

In the instant case, the complaint alleges that petitioners have engaged in a policy and practice of racial steering (App. 15-17), which has "contribute[d] to maintaining existing neighborhood segregation and inhibit[ed] the development of stable racially integrated neighborhoods" (App. 14), and has deprived residents of Henrico County, Virginia, and those who have sought to rent in Henrico County, "of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations that arise from living in integrated communities." (App. 12, 17). The complaint further alleges that, as a result of the petitioners' conduct, HOME members have likewise "been deprived of the right to the important social, professional, business and economic, political and aesthetic benefits of interracial associations." (App. 17-18).

There is no question that interference with the development of racially integrated neighborhoods and the loss of important benefits of interracial associations are distinct and palpable injuries sufficient to confer standing. *Village of Bellwood*, 441 U.S. at 110-11, 113-14; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. at 209-11. *Cf. Linmark Associates, Inc.* v. *Willingboro*, 431 U.S. 85, 94 (1977). Indeed, the allegations of injury in the instant case

are virtually identical to those found to support the standing of plaintiffs in *Village of Bellwood* and *Trafficante.*[13]

In challenging HOME's standing to sue on behalf of its members, petitioners do not contest the palpability of the alleged injuries, but rather, challenge the sufficiency of the pleadings with respect to the causal connection between the injury and the challenged conduct. Brief for Petitioners, pp. 13-14. In addressing this claim, it is important to consider the procedural posture of this case.

In the instant case, the complaint was dismissed for want of standing before any opportunity was afforded for submission of affidavits or other proofs. Plaintiffs filed this action on January 9, 1979 (App. 11-20) and defendants responded with a motion to dismiss on January 31, 1979. (App. 21-25). On February 16, 1979, prior to receiving plaintiffs' memorandum in opposition to the motion to dismiss, the district court rendered its decision dismissing the claims of HOME, Coleman, and Willis. (App. 32).[14]

[13]Lower courts also have conferred standing based on similar allegations of injury to the right to enjoy the benefits of interracial associations. *See, e.g., Shannon v. HUD,* 436 F.2d 809, 818 (3rd Cir. 1970); *Wheatley Heights Neighborhood Coalition v. Jenna Resales Co.,* 429 F. Supp. 486, 489 (E.D.N.Y. 1977); *Sherman Park Community Ass'n v. Wauwatosa Realty Co.,* 486 F. Supp. 838, 842 (E.D. Wis 1980); *Fair Housing Council of Bergen County v. Eastern Bergen County Multiple Listing Serv. Inc.,* 422 F. Supp. at 1081-82; *Village of Forest Park v. Fairfax Realty,* 1 EOHC (P-H) ¶ 13,699 (N.D. Ill. 1975); *Fox v. HUD,* 416 F. Supp. 954, 955-56 (E.D. Pa. 1976); *South East Chicago Comm'n v. HUD,* 343 F. Supp. 62, 66-67 (N.D. Ill. 1972), *aff'd,* 488 F.2d 1119 (7th Cir. 1973).

[14]On February 16, 1979, plaintiffs filed a motion to reconsider (App. 36-37) and, on February 20, 1979, submitted their memorandum in opposition to defendants' motion to dismiss, which, *inter alia,* requested that a final ruling on HOME's standing be deferred until after the deposition of HOME's Executive Director scheduled for February 27. (App. 51, n.6). On February 22, 1979, the district court denied plaintiffs' motion to reconsider and ruled that it would not consider plaintiffs' memorandum. (App. 55).

In its memorandum opinion, the district court expressly relied on *TOPIC* v. *Circle Realty*, 523 F.2d 1273 (9th Cir.), *cert. denied*, 429 U.S. 859 (1976), which held that only direct victims of discrimination could initiate actions under section 812 of the Fair Housing Act, 42 U.S.C. 3612. (App. 34). The court also concluded that the respondents could not sue to vindicate the rights of third parties and that their allegations of deprivation of benefits from interracial asssociations asserted "no more than the general public interest." *Id.* In light of the court's belief that HOME and its employees could not sue under section 812 of the Act to assert the rights of third parties, it is understandable that the court choose not to look further into their allegations of injury. *See, e.g., Village of Bellwood*, 441 U.S. at 112-13 n.25; *Broadmoor Improvement Association, Inc.* v. *Stan Weber & Associates, Inc.*, 597 F.2d at 570. The court thereafter certified its ruling as a final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure and respondents filed their notice of appeal on March 15, 1979. (App. 61).

On April 17, 1979, this Court issued its opinion in *Village of Bellwood* which discredited the Ninth Circuit's decision in *TOPIC* v. *Circle Realty*, and thus, undermined the basis for the district court's decision in the instant case. Recognizing the import of this Court's decision, the district court made a "Formal Request to the United States Court of Appeals for the Fourth Circuit, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, seeking remand of this action in light of *Gladstone, Realtors* v. *Village of Bellwood.*" *See Turner* v. *A.B. Carter, Inc.*, 85 F.R.D. 360, 363 n.3 (E.D. Va. 1980). The court of appeals nevertheless proceeded to consider this case. As a result, this matter was decided by both the district court and the court of appeals based solely on the allegations contained in the complaint.

It is axiomatic that a motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim." *Hospital Building Co.* v. *Trustees of Rex Hospital,* 425 U.S. 738, 746-47 (1976); *Jenkins* v. *McKeithen,* 395 U.S. 411, 421-22 (1969); *Conley* v. *Gibson,* 355 U.S. 41, 45 (1957). Moreover, as this Court stated in *Warth* v. *Seldin,*

> For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.

422 U.S. at 501.

In light of these principles, courts have not hesitated to reject challenges to a plaintiff's standing at the pleading stage of a case, where such challenges were based on an ungenerous reading of the complaint. *See, e.g., National Collegiate Athletic Association* v. *Califano,* 622 F.2d 1382, 1388 (10th Cir. 1980); *Save the Bay, Inc.* v. *United States Corps of Engineers,* 610 F.2d 322, 324-25 (5th Cir. 1980), *cert. denied,* 101 S.Ct. 269 (1981); *Committee for Full Employment* v. *Blumenthal,* 606 F.2d 1062, 1066-67 & n.21 (D.C. Cir. 1979). In so holding,these courts have shown a willingness to accept all reasonable inferences which can be drawn from the complaint in support of plaintiffs' standing.[15] For example, in *Save the Bay, Inc.* v. *United States Corps of Engineers, supra,* a nonprofit

[15]These rulings are consistent with, and derive from, the principle of notice pleading embodied in the Federal Rules of Civil Procedure. That principle discards the notion that a claimant must set forth in detail all relevant facts upon which he bases each claim. *Conley v. Gibson,* 355 U.S. at 47-48. *See also* Roberts, *Fact Pleading, Notice Pleading, and Standing,* 65 Cornell L. Rev. 390, 397-98 (1980).

organization alleged that its members were full and part-time residents of two counties located near a bay and that its members would be adversely affected by the proposed discharge of industrial wastewater into the bay. While noting that the complaint failed to allege that any of the organization's members actually used the bay or were injured in their use of its resources, the court concluded that one could infer from the complaint that at least some of the organization's members could show injury in fact, since "an obvious inference of the English language is that residents of a geographical area 'use' that geographical area." 610 F.2d at 325.[16]

In addition, courts which have encountered challenges to standing based solely on the complaint usually have afforded plaintiffs an opportunity, through amendment, affidavits, or other proofs, to furnish more detailed allegations of fact deemed necessary to support their standing. *See, e.g., Preterm, Inc.* v. *Dukakis,* 591 F.2d 121, 134 (1st Cir. 1979), *cert. denied,* 441 U.S. 958 (1979); *Environmental Defense Fund* v. *TVA,* 468 F.2d 1164, 1171-72 (6th Cir. 1972); *Sherman Park Community Association* v. *Wauwatosa Realty Co.,* 486 F. Supp. 838, 842 (E.D. Wis. 1980); *Huertas* v. *East River Housing Corp.,* 81 F.R.D. at 648-49; *Aiken* v. *Obledo,* 442 F. Supp. 628, 639 (E.D. Cal. 1977); *Wheatley Heights Neighborhood Coalition* v. *Jenna Resales Co.,* 429 F. Supp. 486, 488-89 & n.2 (E.D.N.Y. 1977). In *Warth* v. *Seldin,* this Court approved of this procedure as follows:

[16]By contrast, courts have applied considerably stricter standards when reviewing challenges to standing after a full evidentiary hearing or the submission of detailed proofs. *See, e.g., Citizens Concerned for Separation of Church and State v. City of Denver,* 628 F.2d 1289 (10th Cir. 1980); *Marchezak v. McKinley,* 607 F.2d 37 (3d Cir. 1979).

> . . .it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.

422 U.S. at 501-02. *See also Village of Bellwood,* 441 U.S. at 112 n.25; *Sierra Club* v. *Morton,* 405 U.S. at 735 n.8.

In the instant case, respondents have alleged that the petitioner's conduct contributed to maintaining segregated neighborhoods within Henrico County and that, as a result, members of HOME have been deprived of the benefits of interracial associations. Although the complaint does not specify where HOME's members reside, it is readily inferable that at least some of them reside in neighborhoods within Henrico County which have been adversely affected by the petitioners' conduct. While Henrico County is admittedly a large area, it is certainly conceivable that plaintiffs could establish at trial that the petitioners' conduct contributed to development of a number of segregated neighborhoods, in which HOME members reside, by steering black homeseekers away from its apartment complexes and toward traditionally black or transitional areas of the County. *See Sherman Park Community Association* v. *Wauwatosa Realty Co.,* 486 F. Supp. at 842.[17] Moreover, as respondents state in their brief, on remand, HOME will seek to establish that some of its

[17] In *Village of Bellwood,* 441 U.S. at 112 n.25, 114 n.29, this Court expressly left open the question of whether persons residing outside the precise area targeted by the defendants' conduct can sue under the Fair Housing Act.

members, in fact, reside in one of the petitioners' apartment complexes, namely Camelot Townhouses.[18]

Amici therefore suggest that, rather than address abstract questions on the basis of a nonexistent record, this Court should affirm the judgment of the court of appeals and permit the matter to be remanded to the district court. This result will serve several salutary purposes. First, it will afford the district court the opportunity it once sought to reconsider its ruling in light of this Court's decision in *Village of Bellwood. See Broadmoor Improvement Association, Inc.* v. *Stan Weber & Associates, Inc.*, 597 F.2d at 570. Second, it will provide respondents with the opportunity, normally afforded in such cases, to supply "further particularized allegations of fact deemed supportive of [their] standing." *Warth* v. *Seldin*, 422 U.S. at 501-02. Finally, it will obviate the need to decide the question left open in *Village of Bellwood, see* n.17 *supra*, if HOME succeeds in establishing that its members reside in, or near, one of petitioners' apartment complexes.

Of course, on remand, respondents bear the burden of proving all allegations of fact necessary to support their standing. *Village of Bellwood*, 441 U.S. at 115 n.31. Nevertheless, at this stage of the proceeding, respondents' allegations clearly are sufficient to show that HOME members have sustained sufficient injury to sue on their own behalf.

[18]These members would clearly have standing to sue on their own behalf based on their loss of the important benefits of interracial associations. *See Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. at 209-11.

B. The Interests of HOME's Members Are Germane to the Interests of the Organization

There is no question that HOME satisfies the second criterion for representational standing delineated in *Hunt* v. *Washington State Apple Advertising Commission,* 432 U.S. at 343. The interest which HOME's members seek to protect and the underlying goals of the organization are not only sufficiently close, they are identical. Both seek to secure and preserve the important benefits derived from interracial associations by eliminating discriminatory housing practices and promoting development of racially integrated communities. (App. 13-14, 18).

As noted above, many fair housing organizations were founded for the express purpose of protecting their members' right to live in an integrated community. *See, e.g., Broadmoor Improvement Association* v. *Stan Weber & Associates, Inc.,* 597 F.2d at 569;*Sherman Park Community Association* v. *Wauwatosa Realty Co.,* 486 F. Supp. at 840; *Wheatley Heights Neighborhood Coalition* v. *Jenna Resales Co.,* 429 F. Supp. at 487-88. Accordingly, it is entirely appropriate to permit such organizations to sue on behalf of members whose right to live in integrated communities is threatened.

C. Neither the Claims Presented Nor the Relief Requested Requires Individual Participation of HOME's Members

With respect to the final criterion in *Hunt* v. *Washington State Apple Advertising Commission,* the claims which HOME seeks to present on behalf of its members derive, not from facts or occurrences which are peculiar to individual members, but from the fact that HOME members reside in

areas affected by the petitioners' conduct. Because the loss of important benefits from interracial associations is shared by all members of HOME who reside in the affected communities, vindication of the right to these benefits does not require participation of individual members of the organization.

In addition, this is not a case where the organization seeks to recover damages on behalf of its members.[19] *Local 194, Retail, Wholesale and Department Store Union* v. *Standard Brands, Inc.*, 504 F. 2d 864 (7th Cir. 1976); *Massachusetts Hospital Association, Inc.* v. *Harris*, 500 F. Supp. 1270, 1276-77 (D. Mass. 1980). Here, plaintiffs seek a declaration regarding the legality of petitioners' conduct, an order enjoining the petitioners from engaging in certain discriminatory housing practices, and other affirmative relief designed to eliminate the lingering effects of these practices. (App. 18-19). This relief is declaratory and injunctive in nature. For this reason, "it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth* v. *Seldin*, 422 U.S. at 515. *See also Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. at 343; *Huertas* v. *East River Housing Corp.*, *81* F.R.D. at 649. [20]

[19]To the extent that HOME seeks damages (App. 19, ¶ f) it does so only in its organizational capacity to redress an injury to itself. In fact, the court below expressly noted that HOME could not represent its members in individual claims for damages where the fact and extent of injury would require individualized proof. (App. 75).

[20]Because of the nature of the relief requested on behalf of HOME's members, it may be appropriate on remand for the district court to consider what effect, if any, the consent decree entered in *Coles v. Havens Realty Corp.*, 3 EOHC (P-H) ¶18,031, on February 17, 1981, has on this claim.

Finally, this is not a case where some members of the organization stand to benefit from the litigation, while others may be adversely affected by it. *Associated General Contractors of North Dakota* v. *Otter Tail Power Co.*, 611 F.2d 684, 691 (8th Cir. 1979). Nor is it a case where the views of individual members differ sharply with respect to the issues being litigated. *Harris* v. *McRae*, 448 U.S. 297 (1980); *National Constructors Association* v. *National Electrical Contractors Association, Inc.*, 498 F. Supp. 510, 521 (D. Md. 1980).

Accordingly, HOME is both an appropriate and suitable representative of its members and may maintain this action in its representational capacity.

CONCLUSION

For the foregoing reasons, amici urge that this Court affirm the judgment of the United States Court of Appeals for the Fourth Circuit and hold that, at this stage of the proceeding, respondent HOME has standing to maintain the action both in its organizational and representational capacities.

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No. 80-988

In the Supreme Court of the United States

OCTOBER TERM, 1980

HAVENS REALTY CORPORATION, ET AL., PETITIONERS

v.

SYLVIA COLEMAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the question whether a tester who receives false information from a realty company about the availability of housing has standing to sue under Sections 804(d) and 812 of the Fair Housing Act of 1968 (42 U.S.C. 3604(d) and 3612).

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement:	
A. The testers' suit	2
B. Coles' suit	4
Summary of argument	6
Argument:	
I. This Court may wish to consider whether the writ of certiorari should be dismissed	6
II. Congress has validly provided that "any person" has a right to truthful information about housing availability and may sue for violation of that right	10
Conclusion	16
Appendix A	1a
Appendix B	11a

TABLE OF AUTHORITIES

Cases:

Acha v. *Beame*, 570 F. 2d 57	9
EPA v. *Mink*, 410 U.S. 79	12
Evers v. *Dwyer*, 358 U.S. 202	12
Gladstone, Realtors v. *Village of Bellwood*, 441 U.S. 91	2, 9, 10, 14, 15
Gonzalez v. *Firestone Tire & Rubber Co.*, 610 F. 2d 241	9
Guardians Ass'n of the New York City Police Dep't, Inc. v. *Civil Service Commission of the City of New York*, 633 F. 2d 232	9
Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409	12
Kohn v. *Royall, Koegel & Wells*, 59 F.R.D. 515, appeal dismissed, 496 F. 2d 1094	9
Laffey v. *Northwest Airlines, Inc.*, 567 F. 2d 429, cert. denied, 434 U.S. 1086	10

Cases—Continued Page

Linda R.S. v. *Richard D.*, 410 U.S. 614 ..... 14, 16
Macklin v. *Spector Freight Systems, Inc.*, 478 F. 2d 979 9
NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 12
Pierson v. *Ray*, 386 U.S. 547 16
Sierra Club v. *Morton*, 405 U.S. 727 ..... 14, 15
Simon v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 ..... 15, 16
Taggart v. *Weinacker's, Inc.*, 397 U.S. 223 8
Trafficante v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 2
United States v. *Phosphate Export Ass'n*, 393 U.S. 199 8
United States v. *Real Estate Development Corp.*, 347 F. Supp. 776 12
United States v. *SCRAP*, 412 U.S. 669 15
United States v. *W.T. Grant*, 345 U.S. 629 8
Warth v. *Seldin*, 422 U.S. 490 ..... 14, 16
Wetzel v. *Liberty Mutual Insurance Co.*, 508 F. 2d 239, cert. denied, 421 U.S. 1011 9
White v. *Arlen Realty & Development Corp.*, 540 F.2d 645 12

Statutes:

Civil Rights Act of 1866, 42 U.S.C. 1982 ..... 2, 3
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e-5(3) 9
Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*... 1, 2
Section 801, 42 U.S.C. 3601 1
Section 802(d), 42 U.S.C. 3602(d) 14
Section 804, 42 U.S.C. 3604 ..... 12, 15
Section 804(a), 42 U.S.C. 3604(a) 11, 12
Section 804(b), 42 U.S.C. 3604(b) 12
Section 804(c), 42 U.S.C. 3604(c) 12
Section 804(d), 42 U.S.C. 3604(d) 6, 10, 11, 12, 13, 14, 16
Section 804(e), 42 U.S.C. 3604(e) 12
Section 810, 42 U.S.C. 3610 ..... 1, 14
Section 812, 42 U.S.C. 3612 1
Section 812(a), 42 U.S.C. 3612(a) 9, 11

Statutes—Continued	Page
Freedom of Information Act, 5 U.S.C. 552(a)(3)	12
Truth in Lending Act, 15 U.S.C. 1601 *et seq.*:	
15 U.S.C. 1631(a)	12
15 U.S.C. 1640(a)	12
Miscellaneous:	
114 Cong. Rec. (1968):	
p. 2274	13
p. 2278	13
p. 2281	13
p. 2282	13
p. 2541	13
Davis, *Standing, Taxpayers and Others*, 35 U. Chi. L. Rev. 601 (1968)	15
Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. (1967)	13
Note, *Mootness in the Supreme Court*, 88 Harv. L. Rev. 373 (1974)	9
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978)	9
13 C. Wright, A. Miller, & H. Cooper, *Federal Practice and Procedure: Jurisdiction* (1975)	8-9

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INTEREST OF THE UNITED STATES

Congress enacted the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, to implement the "policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. 3601. While the Department of Housing and Urban Development and the Attorney General have important responsibilities under the Act (see 42 U.S.C. 3610, 3612), complaints by private persons remain the principal means of securing compliance with the fair housing provisions. Accord-

ingly, the United States has a substantial interest in this case, where the issue concerns the class of persons entitled to prosecute complaints under the Act. The United States participated as amicus curiae in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), and *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91 (1979), both of which also concerned standing under the Fair Housing Act.

STATEMENT

A. The Testers' Suit

On January 9, 1979, three individual plaintiffs—Paul Allen Coles, Sylvia Coleman, and R. Kent Willis—and one organizational plaintiff, Housing Opportunities Made Equal ("HOME"), filed a class action suit against Havens Realty Corporation and one of its employees, Rose Jones ("Havens"), in the United States District Court for the Eastern District of Virginia, alleging that Havens had denied housing on the basis of race and engaged in "racial steering" in violation of the Fair Housing Act of 1968, 42 U.S.C. 3601 *et seq.*, and the Civil Rights Act of 1866, 42 U.S.C. 1982 (J.A. 11-20).[1]

Havens operates two apartment complexes, Camelot Townhouse Apartments and Colonial Court Apartments, in Henrico County, Virginia, a suburb

[1] The complaint alleged the class consisted of "all persons who have rented or sought to rent residential property in Henrico County, Virginia, and who have been, or continue to be, adversely affected by the acts, policies and practices" of Havens (J.A. 12). The complaint charged that Havens engaged in "steering" by showing apartments in a building occupied primarily by whites only to white applicants and refusing to show those apartments to blacks, while directing blacks to rental units in a "less racially segregated [white] building" (J.A. 15).

of Richmond (J.A. 14). The complaint described Coles, who is black, as a "renter plaintiff" and alleged that on July 13, 1978, Coles inquired about the availability of an apartment at the Camelot complex (predominantly occupied by whites) and Havens falsely informed him that no apartments were available (J.A. 15-16).

The complaint described Sylvia Coleman as a "black tester" and R. Kent Willis as a "white tester," who were employed by HOME to determine whether Havens practices racial steering (J.A. 13). According to the complaint, Coleman and Willis each made inquiries of Havens on March 14, March 21, and March 23, 1978, about the availability of apartments, and on each of those occasions Coleman was told that nothing was available and Willis was told that apartments were available (J.A. 16-17). On July 6, 1978, Havens again told Coleman there were no vacancies, while giving contrary information to a white tester (*ibid.*).

Coles and Coleman claimed that Havens' steering practices denied them the right to rent property,[2] and all three individual plaintiffs claimed that those practices deprived them of the advantages and benefits that arise from living in an integrated community (J.A. 17). HOME alleged that Havens' racial steering practices frustrated its efforts to provide equal access to housing through counseling and other referral services (*ibid.*), and that its members had been individually injured by being deprived of the benefits of living in an integrated community (J.A. 18). The complaint sought declaratory and injunc-

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[2] Coles and Coleman based their claims on 42 U.S.C. 1982, as well as the Fair Housing Act of 1968 (J.A. 17).

tive relief against Havens (J.A. 18-19); it also sought actual and punitive damage awards for Coles, Coleman and Willis, as well as HOME's testing expenses and costs and attorneys' fees (J.A. 20).

Havens filed a motion to dismiss the complaint (J.A. 21-25). The district court granted the motion on February 16, 1979, as to all claims except renter plaintiff Coles' claim based on the July 13, 1978 incident (J.A. 33-35). The court dismissed Coleman, Willis and HOME as plaintiffs for lack of standing (J.A. 34), and concluded that only the July 13 incident was within the 180 day statute of limitations of 42 U.S.C. 3612(a) (J.A. 33).

Plaintiffs appealed. On September 18, 1980, the court below reversed the district court's judgment and remanded the case for further proceedings (J.A. 63). The court of appeals concluded that Willis and Coleman have standing both as testers and as persons deprived of the benefits of residing in an integrated community, and that HOME has standing both as a representative of its injured members and on the basis of its own injury from racial steering (J.A. 68). The court also held that none of the incidents of steering was time-barred, because the final act of Havens' continuing violation of the Fair Housing Act occurred less than 180 days before the complaint was filed (J.A. 79).

B. Coles' Suit

While the testers' case was on appeal, renter plaintiff Coles' case went to trial and the district court found that Havens had engaged in unlawful racial steering. On February 17, 1981, the district court approved a consent judgment, enjoining Havens from violating the Fair Housing Act and Section 1982 and requiring Havens for a three-year period: (a) to

maintain and display accurate information regarding the availability of its rental properties; (b) to make available to all applicants for apartments a statement of its criteria and procedures for approving applications; (c) to maintain and regularly submit to the Virginia Real Estate Commission ("Commission") records concerning the race of all persons who visit its rental offices seeking information; (d) to make available to HOME (through the Commission) copies of rental applications or executed leases; and (e) to display notices, posters and symbols identifying itself as "an equal housing opportunity realtor" (App. A, *infra*).[3] The consent judgment also awarded damages to Coles and to members of the class he represented.

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[3] The complaint filed by Coles, the testers, and HOME sought an injunction requiring Havens to take affirmative action to overcome the effects of past discrimination, including (J.A. 19):

> (i) the soliciting and encouraging of blacks to rent units in predominantly white communities and whites to rent units in predominantly black and integrated communities;
>
> (ii) the adequate advertising in appropriate publications and circulation of information concerning apartments available in defendants' files;
>
> (iii) the adoption of a uniform system of rules, regulations, codes, etc., together with enforcement procedures, designed to ensure that defendants' past discriminatory actions are not repeated or continued, including the adoption of a policy of hiring personnel in its real estate office without regard to race; and
>
> (iv) the prompt reporting in written form by defendants of such information as the Court deems necessary to enable the efficient monitoring of the defendants' compliance with other parts of the Court's order and the Fair Housing Laws of the United States * * *.

SUMMARY OF ARGUMENT

Respondents' claims against Havens may be moot as a result of the entry of the consent judgment granting both injunctive relief and class-wide damages in renter Coles' case. In any event, petitioners are already under a court order to terminate their discriminatory practices and relief has been awarded the class harmed by their practices. Accordingly, this Court's resolution of the merits of their contentions will have little, if any, effect on the parties. Moreover, petitioners do not question the use of testers as witnesses to provide evidence in housing discrimination suits; such evidence is often vital to establish violations of the Fair Housing Act. In light of these considerations, the Court may wish to consider dismissing the writ as improvidently granted.

If the Court chooses to reach the merits, we believe that the right conferred by Section 804(d) not to be given false housing information because of race is not limited to bona fide purchasers and renters, but extends to "any person" seeking such information, including both individual testers and organizations.

ARGUMENT

I. THIS COURT MAY WISH TO CONSIDER WHETHER THE WRIT OF CERTIORARI SHOULD BE DISMISSED

The consent judgment entered by the district court in *Coles* v. *Havens Realty Corp., et al.*, on February 17, 1981, enjoined petitioners' steering practices, and awarded damages to Coles and his class. It is arguable that the *Coles* consent judgment has provided respondents with full relief and thus rendered the instant case moot.

The consent judgment enjoins petitioners from future violations of the Fair Housing Act, the primary equitable relief sought by respondents (see J.A. 18-

19). While the order does not include all the affirmative measures suggested in respondents' complaint, *e.g.*, solicitation of blacks to rent in buildings occupied predominantly by whites and of whites to rent in buildings occupied predominantly by blacks and in integrated buildings (J.A. 19), it does establish procedures for monitoring petitioners' compliance with the law, including making relevant information available to HOME (App. A, *infra*, 4a-6a). The consent order thus provides essentially the injunctive relief sought in the complaint.[4]

The consent order also establishes a fund to provide damages to "all claimants" who "sought housing information" but were informed that apartments were not available (App. A, *infra*, 6a-7a). Although respondent Coleman, the black tester, may be a "claimant" entitled to participate in that fund,[5] Willis, the white tester, clearly is not.[6]

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[4] It is, moreover, doubtful that a district court ordinarily would, at the behest of testers, expand upon relief granted to a would-be renter and the class he represents.

[5] The certified class includes "all black persons who may have been injured monetarily by the alleged racial steering practices * * * since 9 January 1977" (App. B, *infra*, 11a). Since the district court had previously dismissed the complaint as to the tester plaintiffs on the ground that they "assert no more than the general public interest" (J.A. 34), it apparently did not believe the testers had been "injured monetarily", and intended the class to include only *bona fide* renters. It is not clear whether the court or the parties also intended the "claimants" to be so limited. Nor is it clear whether HOME could be considered a "claimant" who "sought housing information" through tester Coleman. In any event, we are informed by respondents' counsel that none of the respondents sought to recover from the fund.

[6] Respondents also sought costs, attorney's fees, and HOME's expenses for testing and monitoring Havens' prac-

Even if the remaining subsidiary claims suffice to prevent this case from meeting the "stringent" test for mootness (*United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)), the intervening consent decree greatly reduces the practical importance of the respondents' claims.[7] In these circumstances, as in *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 224-225 (1970), the Court may appropriately conclude:

> While the changed circumstances do not necessarily make the controversy moot, they are such that, if known at the time the petition for a writ of certiorari was acted upon, we would not have granted it. For such small embers of controversy that may remain do not present * * * [any] conflict that we need sit to resolve.

Cf. *United States* v. *W.T. Grant*, 345 U.S. 629 (1953) (although corporate director's resignation from interlocking directorships did not moot challenge to legality under Clayton Act of holding such positions, it did justify district court's refusal to issue an injunction, so that Court did not reach merits of Clayton Act claim).[8]

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tices. J.A. 20. The consent judgment awarded Coles' counsel—the same counsel who represents respondents—$17,500 as attorney's fees (App. A, *infra*, 9a).

[7] The practical importance of these claims is further reduced by the Virginia Real Estate Commission's 6-month suspension of the Broker's license of Arthur E. Havens, Jr., on the basis of the discriminatory housing practices of Havens Realty Corporation adjudicated in *Coles* v. *Havens Realty Corp.*, *supra*. Equal Opportunity Housing (P-H) ¶ 18,033 (E.D. Va. Aug. 25, 1981).

[8] Commentators have also recognized that "mootness decisions frequently reflect avowedly flexible doctrines of remedy and judicial administration". 13 C. Wright, A. Miller, &

For these reasons, the Court may conclude that this case presents an inappropriate context in which to decide the question of the standing of testers under the Fair Housing Act that this Court expressly reserved in *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 111 (1979).[9]

H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3533, at 266 (1975); accord, Note *Mootness in the Supreme Court*, 88 Harv. L. Rev. 373, 377-378 (1974). Cf. R. Stern & E. Gressman, *Supreme Court Practice* ¶ 18.1, at 885 (5th ed. 1978).

[9] As amici Lawyers' Committee for Civil Rights Under Law, *et al.* note (Br. 11-13), the timeliness issues in this case are intertwined with the standing issues. The court of appeals found that petitioners' steering practices constituted a continuing violation that extended into the 180-day limitation period in 42 U.S.C. 3612(a) (J.A. 41-43). Title VII has a similar 180-day limitation period for bringing charges of discrimination in employment (42 U.S.C. 2000e-5(e)), and the courts have consistently upheld the timeliness of complaints alleging a continuing practice of employment discrimination when the complaint is filed within 180 days of the last challenged discriminatory act. See, *e.g.*, *Guardians Ass'n of the New York City Police Dep't, Inc.* v. *Civil Service Commission of the City of New York*, 633 F.2d 232, 251 (2d Cir. 1980); *Acha* v. *Beame*, 570 F.2d 57, 65 (2d Cir. 1978); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 1011 (1975); *Gonzalez* v. *Firestone Tire & Rubber Co.*, 610 F.2d 241 (5th Cir. 1980). The continuing violation theory is not limited to situations in which the plaintiffs have a continuing employment relationship with the defendants; it has also been applied to allow otherwise time-barred claims of class members discriminatorily refused employment. See, *e.g.*, *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 987 (D.C. Cir. 1973); *Kohn* v. *Royall, Koegel & Wells*, 59 F.R.D. 515, 518 (S.D.N.Y. 1973), appeal dismissed on other grounds, 496 F.2d 1094 (2d Cir. 1974). Because the same broad remedial purposes underlie the Fair Housing Act and Title VII, it is appropriate to interpret the similar statute of limitations in

II. CONGRESS HAS VALIDLY PROVIDED THAT "ANY PERSON" HAS A RIGHT TO TRUTHFUL INFORMATION ABOUT HOUSING AVAILABILITY AND MAY SUE FOR VIOLATION OF THAT RIGHT

On the merits of the standing issue, we submit first, that it is important to recognize that this case involves only the question whether suits challenging steering practices may be brought by testers, or by fair housing organizations on the basis of tester information. It does not cast any doubt on the use of testers to collect evidence of steering, or on the admissibility of that evidence in suits brought by bona fide seekers of housing or by residents of the affected community. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, *supra*, 441 U.S. at 97-98. In such suits, the admissibility of tester evidence to show a pattern of discriminatory practices does not depend on whether the testers themselves have standing to sue or whether a suit by them would be timely (see note 9, *supra*).

While others may have a broader basis for standing, a tester, as a "person", is among those on whom

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the Fair Housing Act as also providing for a continuing violation theory to preserve the class-based claims of would-be renters or residents whose living environment has been affected, both of whom, like Title VII plaintiffs, suffer continuing effects from the challenged discriminatory course of conduct. It is less clear that the continuing violation concept should be available to testers whose standing is based only on the violation of their right under 42 U.S.C. 3604(d) to receive truthful information in response to specific inquiries about the availability of housing at a particular time. Cf. *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 473 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978) (former employees, separated in time-barred period, not allowed to rely on continuing violation theory). We assume for the purposes of this brief, however, that respondents' claims are not time-barred.

the Fair Housing Act confers a legal right to truthful information about available housing and for whom the Act provides a judicial remedy where that right is abridged. Section 804(d) (42 U.S.C. 3604 (d)) provides that it is unlawful for a real estate agency:

> [t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

In Section 812(a) (42 U.S.C. 3612(a)) Congress provided an explicit cause of action for such violations:

> The rights granted by sections 803, 804, 805 and 806 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction.

In light of this clear statutory language, it is evident that a tester who is falsely informed that no housing is available has a statutory cause of action to challenge steering.[10]

Section 804(d) contains no limiting language similar to the requirement in Section 804(a) of a "bona fide offer" to rent or purchase (42 U.S.C. 3604(a)). Instead, it broadly bans discriminatory representa-

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[10] Although the complaint here asserts that the testers have been deprived of the "important social, professional, business and economic, political and aesthetic benefits of inter-racial associations that arise from living in integrated communities free from discriminatory housing practices" (J.A. 17), it also asserts that the "action arises under 42 U.S.C. * * * § 3604" (J.A. 12). This assertion is sufficient to allege standing under Section 3604(d) as well as Section 3604(a).

tions to "any person".[11] This wide scope reflects the congressional design to provide in Section 804 an effective tool for a comprehensive attack on housing discrimination by banning a "broad range of discriminatory practices," *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 417 (1969), that may be sophisticated as well as crude. *United States* v. *Real Estate Development Corp.*, 347 F. Supp. 776 (N.D. Miss. 1972). Thus, Section 804 reaches not only direct discriminatory refusals to sell or rent (804(a)) and discrimination in the terms and conditions of sale or rental (804)(b)), but also more subtle ways of limiting the availability of housing for racial reasons, *e.g.*, through racial advertising (804(c)), false representations of unavailability (804(d)), or "blockbusting" (804(e)). In order to ensure that housing would not be discriminatorily denied, Congress concluded that it was necessary to prohibit not only the outright denial itself, but also actions that lead directly or indirectly to the maintenance of segregated housing, such as misrepresentations of unavailability.

The legislative history of the Act reflects Congress' awareness of the use of misrepresentations of un-

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[11] It is not necessary to show a "need" for the housing information. The right accorded by 42 U.S.C. 3604(d) is analogous to that created by the Freedom of Information Act, 5 U.S.C. 552(a)(3), making certain government documents available to "any person" who requests them. This Court has held that a plaintiff suing for the release of such material is not required to show any need for it. *EPA* v. *Mink*, 410 U.S. 73, 79, 86 (1973); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

Similarly, the Truth in Lending Act requires certain disclosures by creditors to "each person" to whom credit is extended (15 U.S.C. 1631(a) and 1640(a)); a debtor accordingly has standing to sue whether or not he was misled by the nondisclosure. *White* v. *Arlen Realty & Development Corp.*, 540 F.2d 645, 649-650 (4th Cir. 1975).

availability as one means of maintaining segregated housing. Various witnesses testifying in August 1967 before the Senate Subcommittee on Housing and Urban Affairs, which was considering the original version of the Fair Housing Act, recounted incidents where black persons seeking housing were falsely informed that housing was not available. See *Fair Housing Act of 1967: Hearings on S. 1358, S. 2114, and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 99 (1967) (testimony of Roy Wilkins); 204, 206 (testimony of Gerard A. Ferere); 497 (testimony of Whitney M. Young, Jr.). See also 114 Cong. Rec. 2541 (1968) (remarks of Senator Percy).[12]

The purpose of extending the protection of Section 804(d) beyond bona fide renters or purchasers to "any person" is clear. To violate that provision is to deny housing by subterfuge, and victims of that subterfuge will not readily detect it; their preoccupation with finding a place to live makes it impractical to investigate every representation of unavailability. In

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[12] Congress was also concerned about the psychological impact on the individual of racial discrimination in housing, recognizing that suffering racially invidious treatment is itself an injury. See, *e.g.*, 114 Cong. Rec. 2274, 2278, 2281 (1968).

Senator Brooke explained the effects on black Americans (*id.* at 2282):

> I have seen the impact upon them, and I know very well what they mean when they say, "it is not just the fact that I am the last hired and the first fired; it is not even the bad conditions under which I am forced to live; but it is that I do not feel like a man, that I am denied the right to feel, to act, and to stand as a man, to live with human dignity. That is what is most important to me. I want to feel like a man. I want to act like a man. I want to live in dignity."

Section 804(d), therefore, Congress concluded that the only effective way to ensure that persons in need of housing are not deceived is to ban racially motivated misrepresentations of unavailability to *any* person.[13]

Petitioners do not challenge the statutory standing of the tester respondents and HOME. They contend only that the tester respondents and HOME failed to satisfy the minimal constitutional requirements for standing, asserting that they failed to show a distinct and palpable injury to their own rights that is substantially likely to be redressed by the relief requested (Br. 22). This Court has frequently recognized that Congress can create legal rights, the invasion of which creates standing, even though there would be no standing without the statute. *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973). As the Court recognized in *Warth* v. *Seldin*, 442 U.S. 490, 512-514 (1975), that is precisely what Congress has

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[13] Section 802(d) of the Act defines "person" to include "corporations," "partnerships," and "associations," as well as individuals. 42 U.S.C. 3602(d). Thus, a fair housing organization such as HOME would have standing to challenge racial steering, at least if the false representations of unavailability were made directly to the organization or to a person known to be acting on its behalf.

HUD provides informal conciliation procedures under Section 810 of the Fair Housing Act. See *Gladstone, Realtors* v. *Bellwood, supra*, 441 U.S. at 103-109. Complaints under this section generally are filed by individuals seeking housing. HUD has also acted on complaints by organizations like HOME acting on the basis of steering evidence disclosed by testers, but is not aware of instances in which it has acted on complaints by individual testers. Consistently with the views expressed in this brief, however, HUD would accept complaints alleging Section 804(d) violations from organizations or individual testers.

done here. As noted *supra*, the statutory rights created by 42 U.S.C. 3604 are not only to rent or purchase housing without suffering discrimination, but also to receive truthful information about available housing. There can be no doubt that petitioners denied the black tester such information, and thus inflicted a direct and palpable injury to that statutorily created right.[14] That injury is sufficient to satisfy the "Art. III minima" of the constitutional standing requirement (*Gladstone, Realtors* v. *Village of Bellwood, supra*, 441 U.S. at 100).

It is constitutionally irrelevant whether the injury is judicially perceived as significant, since " 'an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation.' " *United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973), quoting Davis, *Standing, Taxpayers and Others*, 35 U. Chi. L. Rev. 601, 613 (1968). In any event, the interest in being free of the psychological impact of the racial discrimination inherent in the false denial that apartments are available is at least as significant as the "aesthetic and environmental well being" that the Court recognized as a sufficient constitutional basis for standing in *Sierra Club* v. *Morton, supra*, 405 U.S. at 734, and *United States* v. *SCRAP, supra*, 412 U.S. at 686. Moreover, as the court of appeals noted (J.A. 69-70), it is constitu-

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[14] If given false information, an organization like HOME might also suffer palpable injury if racial steering practices such as petitioners' impeded efforts like HOME's to provide counseling and referral services to those seeking integrated housing in the target area by limiting the supply of such housing (See J.A. 17). That is a distinct injury to the organization itself, and not merely harm to its abstract interest in equal housing. Compare *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 (1976).

tionally irrelevant that a complainant intentionally exposed himself to the injuries of which he complains for the purpose of testing petitioners' actions. *Evers* v. *Dwyer*, 358 U.S. 202 (1958); *Pierson* v. *Ray*, 386 U.S. 547 (1967).[15]

CONCLUSION

This Court may wish to consider dismissing the writ as improvidently granted. Otherwise, its opinion should reflect that the Act validly confers a right on "any person" to secure truthful information on housing availability and to sue for violation of that right.

Respectfully submitted.

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Department of Housing and Urban Development

SEPTEMBER 1981

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[15] Because petitioners themselves gave false information in violation of 42 U.S.C. 3604(d), this case does not involve the sort of indirect injury that the Court has noted "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of defendants' actions, or that prospective relief will remove the harm." *Warth* v. *Seldin*, *supra*, 422 U.S. at 505; see also *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, 426 U.S. at 44-45; *Linda R.S.* v. *Richard D.*, *supra*.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 79-0024

PAUL ALLEN COLES, PLAINTIFF

v.

HAVENS REALTY CORPORATION,
a Virginia corporation and
ROSE JONES, DEFENDANTS

Filed Feb. 17, 1981

CONSENT ORDER

This is a class action brought by the named plaintiff under the Fair Housing Act of 1968, 42 U.S.C. §§ 3601 *et seq.* and the Civil Rights Act of 1866, 42 U.S.C. § 1982. The Complaint alleges that the defendants have engaged in acts, policies, and patterns of denying housing on the basis of race or color and of preserving and encouraging patterns of racial segregation in available housing by denying apartments to black persons or by "steering" black persons to selected buildings and away from other buildings and by steering white persons to certain selected buildings. Such acts, policies, patterns and practices are in direct violation of the above-referenced statutes.

On February 13, 1980, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, the Court certified a class composed of all black persons who may have been injured monetarily by the alleged racial steering practices of the defendants on or since January 9, 1977. Plaintiff Paul Allen Coles was designated to act as representative for this class. The Court also certified a subclass composed of all black persons who may have been injured monetarily by the alleged racial steering practices of the defendants on or since July 13, 1978. Plaintiff Paul Allen Coles was designated to act as representative for this subclass. Notice to prospective class members, as they could best be ascertained from the defendants' records, was mailed on or about May 15, 1980.

The trial of the case of *Paul Allen Coles v. Havens Realty Corporation, et al.* was held in this Court on June 22 and 23, 1980. The Court finds from the evidence presented in this case that the policies and acts of the defendants Havens Realty Corporation and Rose Jones violated the provisions of the Fair Housing Act of 1968 and the Civil Rights Act of 1866.

The parties are desirous of resolving this matter, including resolution of any remaining issues to be determined by this Court without the time and expense of further litigation, and whereas the defendants hereby agree to comply with the terms and provisions of this Order, and to dismiss the appeal of this action to the Fourth Circuit Court of Appeals, plaintiff agrees not to seek a litigated determination of any remaining unresolved factual or legal issues. On these bases, both the plaintiff and defendants consent to the entry of this Order. Accordingly, it is

ORDERED, ADJUDGED, AND DECREED that the defendants Havens Realty Corporation (herein-

after referred to as "Havens") and Rose Jones are hereby permanently enjoined from violating the terms of the Fair Housing Act of 1968 and the Civil Rights Act of 1866. It is further

ORDERED, ADJUDGED, AND DECREED that the terms and provisions of Sections I and II of this Consent Order shall remain in full force and effect for three (3) years from the date of entry of this Order, at which time the provisions hereof shall expire automatically; provided, however, that if the Court finds that the defendants materially violate any of the provisions of Sections I and II of this Order, or the injunctive provisions hereof, the Court will determine appropriate relief therefor, including possible extension of Section I and II beyond the date Sections I and II would otherwise terminate.

I. RENTAL PROCEDURES

It is further ORDERED, ADJUDGED AND DECREED that within the time periods specified below, Havens shall implement the following procedures with regard to the rental of apartments at its Camelot Townhouse and Colonial Court complexes.

A. Beginning not later than thirty (30) days from the date of the entry of this Order, Havens shall establish and thereafter continuously maintain and display in its rental office, in a conspicuous location, at all times, a current "Apartment Availability" display (wording and form attached hereto as Exhibit A), indicating the types of rental dwellings which it knows or believes are currently available for rent and which it anticipates will become available. Information concerning these availabilities will be made known, whenever possible, to persons inquiring by telephone about apartments at Colonial Court or Camelot Townhouse. In addition, Havens shall maintain a Rental Availability Activity Record for each

of its complexes (wording and form attached as Exhibit B), which shall indicate, by apartment number, on a continuous basis, in a narrative form, such information that becomes known to Havens regarding actual or anticipated dates upon which such apartment will or may become available for rent. When an apartment is leased, the narrative will state the date and time the lease was signed and the name and race of the lessee. Finally, Havens will post in a conspicuous location, or prepare and have available for distribution to all persons who submit an application for an apartment, a statement of criteria and procedures employed by it in approving or disapproving applications. Although such statement shall disclose what criteria are utilized by Havens, it is not required that it disclose the specifics of such criteria that would enable applicants or potential applicants to complete an application with information with actual knowledge of whether the application will be accepted by Havens. For example, if Havens customarily requires that rental payments not exceed a percentage of gross or net income, Havens shall so state but Havens is not required to disclose what that percentage is. Any restrictions that may be applicable to particular dwelling units (*e.g.*, no pets allowed in a particular section) shall also be stated. Every two weeks, Havens shall mail two copies of the information which is reflected on the display at the end of the business day as well as two copies of the Rental Activity Availability Record to the Virginia Real Estate Commission ("the Commission"). Havens shall also mail a copy of its initial rental criteria disclosure statement to the Commission, showing the specifics of the rental criteria, and thereafter provide the Commission with notice of any changes or

modifications thereto. The rental disclosure statement showing the specific rental criteria shall be for the Commission's and Housing Opportunity Made Equal's (HOME's) confidential use and shall not be disseminated to the public.

B. Beginning not later than thirty (30) days from the date of the entry of this Order, Havens shall commence the use of an "Office Registration Form" (wording and form attached as Exhibit C) to obtain information set forth on the form from persons visiting its rental office and inquiring as to the availability of apartments. Havens shall indicate on all completed forms the race of the applicant by marking a "W" for white persons, a "B" for black persons, and an "O" for persons of other or unknown races. Havens is not required to have the Office Registration Form completed by all persons visiting its rental office and inquiring as to the availability of apartments, and it need only request such persons to complete same. Havens shall accumulate copies of the Office Registration Forms and forward two copies quarterly to the Commission. Upon not less than five (5) working days notice to Havens, the Commission shall have the right to be provided with copies, at the Commission's expense, of rental applications and executed leases, provided, however, that the Commission shall only be so entitled if it makes such request by either (i) identifying the name of the current tenant(s) in respect of whom it desires a copy of the rental application(s) or executed lease(s), or (ii) identifying the apartment number(s) in respect of which it desires a copy of the rental application(s) or executed lease(s) pertaining to the then current tenant or the tenant occupying that apartment immediately prior to the then current tenant. The request for such information shall be made to the

Commission by HOME. HOME shall make such requests only when it has a need for such individual applications and executed leases, and HOME shall not make such requests merely for the purpose of collecting such information and documents merely in the event that it may, at some time in the future, have a need for them.

II. DISPLAY OF FAIR HOUSING STATEMENT

It is further ORDERED, ADJUDGED AND DECREED that Havens shall include in all public advertisements of any dwellings offered for rent that are published more than thirty (30) days after the date of the entry of this Order, on all rental applications, leases, and on the "Apartment Availability" display the following statement in bold-face type:

> "HAVENS REALTY CORPORATION IS AN EQUAL HOUSING OPPORTUNITY REALTOR";

provided, however, that the statement shall not be required to be used in advertisements that are smaller than four column inches. Havens shall also display the fair housing poster that is recommended in the United States Department of Housing and Urban Development Guidelines, 37 Fed. Reg. 6700, in a conspicuous location in its office, and the Equal Housing Opportunity logotype and statement on its rental signs as provided in 37 Fed. Reg. 6700.

III. DAMAGES

It is further ORDERED, ADJUDGED AND DECREED that not later than 30 days from the date of this Order Havens shall deposit in the Court registry the sum of Thirteen Thousand Five Hundred Dollars ($13,500) to be distributed among all claimants whose Proof of Claim forms are approved in the manner set forth below.

Claimants shall be required to file Proof of Claim forms not later than sixty days from the date of the approval hearing on this Order. Each Proof of Claim form will be reviewed by counsel for HOME and counsel for Havens. The validity of each claim shall be established presumptively by a *prima facie* showing of racial discrimination. For purposes of this Consent Order, this standard will be met by a claimant's sworn statement that he sought housing information during the period in question about the Camelot Townhouse/Colonial Court Complex but was told that there were no apartments available or that there were apartments available only at Colonial Court or that he sought housing information about Camelot Townhouse only but was told that there were no apartments available or that there were apartments available only at Colonial Court. Havens shall have the opportunity to dispute such claims by coming forward with evidence of a neutral (nondiscriminatory) justification for its actions. The claimant shall then have the opportunity to rebut Havens' evidence.

Not later than thirty days from the final date for submission of Proof of Claim forms, counsel shall submit to the United States Magistrate a detailed report of their findings including a descriptive list of all Proof of Claim forms reviewed, the manner in which the review was conducted, and the disposition (with explanation) of each claim. Any claim which is rejected or objected to, or as to which any question is raised, by either designee, will be referred to the Magistrate for such further proceedings as he may deem appropriate to determine its validity. Such proceedings may include, *inter alia*, the taking of evidence, the holding of hearings, and the submission of written statements. Claimants will be promptly informed as to the disposition of their claims or,

where applicable, of their referral to the Magistrate.

At the conclusion of the claims review process, the $13,500 fund will be divided pro-rata among all claimants whose claims have been approved, provided, however, that in no event shall any claimant be entitled to receive in excess of $1,000. Named plaintiff Paul Allen Coles will receive $2,250 which is not included in the $13,500 fund. If, after distribution of the fund, there are funds remaining, such funds shall be returned to Havens.

The Court, in its discretion, may order a final report to be submitted by the Magistrate detailing the ultimate disposition of all claims and funds.

IV. CONTACTING AND COUNSELING PROSPECTIVE CLAIMANTS

In addition to the notice procedures prescribed by the Court, HOME or its representatives may contact persons whom it believes have cause to assert claims pursuant to this Order. Such contacts shall be limited to identifying prospective claimants and then to delivery in person, by posting, by mail or by reading on the telephone the following notice:

> Dear ————————:
>
> We are writing to inform you that you may file a claim for money damages in a housing discrimination lawsuit.
>
> The lawsuit was filed in January 1979 in the United States District Court in Richmond by Paul Allen Coles against Havens Realty Corporation. The plaintiff claimed that Havens Realty discriminated in the rental of apartments at its Camelot Townhouse and Colonial Court apartments. Havens Realty has agreed to pay the total sum of $13,500 to be divided among per-

sons who can come forward with sworn claims proving racial discrimination by Havens Realty. Each person proving a claim would be limited to $1,000. It is not necessary for you to have rented an apartment from Havens Realty in order to prove a claim.

If, since January 9, 1977, you have sought apartments at the Colonial Court and Camelot Townhouse apartments and were told by Havens Realty either that nothing was available or that apartments were available only at Colonial Court, you may have a claim for discrimination. If this is the case and you are interested in filing a claim, contact James F. Stutts, attorney for the plaintiff, at 121 Shockoe Slip, Richmond, Virginia 23219, telephone 643-5192.

Havens shall pay actual attorneys fees in the total aggregate amount of $750 to McSweeney, Stutts & Burtch, for advising any and all claimants with respect to the filing of claims pursuant to this Order. No other attorneys fees incurred by any claimant shall be awarded.

V. ATTORNEY FEES

It is further ORDERED, ADJUDGED AND DECREED that the defendants shall pay to the plaintiff's counsel, in addition to the sum specified in Section IV herein, the total sum of Seventeen Thousand Five Hundred Dollars ($17,500) as attorney's fees.

VI. RELEASE AND DISMISSAL

The payment of the foregoing amounts by the defendants shall constitute a full release, accord, and satisfaction by all plaintiffs, including those that may

hereafter be joined by the Court pursuant to the class certification of this action, for all damages, costs, expenses, and fees incurred in all negotiations and/or other activities arising out of the Complaint filed herein.

Except for Sections I and II of this Order which require affirmative duties on the part of the defendants, this action shall stand dismissed. ORDERED this 17th day of February 1980.

/s/ D. Dortch Warriner
United States District Judge

THE PARTIES CONSENT TO THE ENTRY OF THIS ORDER:

For the Plaintiff:

/s/ James F. Stutts
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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 79-0024-R

PAUL ALLEN COLES

v.

HAVENS REALTY CORPORATION, ET AL.

Filed Feb. 13, 1981

ORDER

In accordance with the memorandum this day filed, the following class will be CERTIFIED pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure:

> A class composed of all black persons who may have been injured monetarily by the alleged racial steering practices of Havens Realty Corporation or Rose Jones, on or since 9 January 1977.

The Court hereby designates plaintiff Paul Allen Coles to act as representative for this class.

Further, the following subclass will also be CERTIFIED:

> A subclass composed of all black persons who may have been injured monetarily by the alleged

racial steering practices of Havens Realty Corporation or Rose Jones, on or since 13 July 1978.

The Court hereby designates plaintiff Paul Allen Coles to act as representative for this subclass.

The parties are DIRECTED to confer toward the goal of proposing a notice procedure for approval by the Court as contemplated in Rule 23(c)(2) of the Federal Rules of Civil Procedure to ensure the protection of absent parties who stand to be bound by a final judgment in the instant action. Such proposal shall be tendered to the Court within 15 days of the date of this order.

And it is so ORDERED.

/s/ D. Dortch Warriner
United States District Judge

Date: 13 February 1980

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